IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DANIEL FREDERICKSON,

Defendant and Appellant.

Capital Case No. S067392

Orange County Superior Court
No. 96CF1713

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Orange
Honorable William R. Froeberg, Judge

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State Public Defender

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Statutes

Evid. Code

Pen. Code

TABLE OF AUTHORITIES

Constitutions

Jury Instructions

TABLE OF AUTHORITIES

Texts & Other Authorities

TABLE OF AUTHORITIES

Page(s)

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a death sentence. (Pen. Code, § 1239, subd. (b).)

INTRODUCTION

This case most likely would not be before this Court on automatic appeal if the municipal court had not rebuffed appellant's attempt to accept responsibility by pleading guilty, retaining counsel, and proceeding directly to the penalty phase, instead of forcing him through a guilt phase at which he represented himself, and then through a penalty phase at which he was unable credibly to inform the jury that he had accepted responsibility for the crime by pleading guilty.

In June 1996, appellant walked into a crowded Home Base store in Santa Ana, waited, approached the customer service manager while the latter was at the safe getting change, quietly asked the manager for the money, and

displayed a pistol in his pocket. When the manager ignored him, closed the safe and began to walk away, appellant, frustrated by those actions, approached and fired a fatal shot to the manager's head, then fled from the store.

The following day, appellant was arrested. That night he was interrogated and admitted responsibility. The next morning, he admitted responsibility to a reporter.

The Public Defender was appointed at appellant's first appearance in municipal court, but no plea was entered for several months. During the intervening time, appellant decided to plead guilty, accept responsibility for the crime, and focus on a case for life at the penalty phase. The record shows that he sought to do so to save his life, not out of a desire to commit suicide, and that he was competent to make such a fundamental decision about his case.

Under Penal Code section 1018, however, a guilty plea in a capital case cannot be accepted without the presence and consent of counsel. Before entering a plea, appellant moved to substitute counsel and informed the municipal court of his intent to plead guilty, and that his decision was causing a conflict with the Public Defender, who, according to appellant, desired additional time to investigate. Appellant made clear to the court, however, that he both desired and required representation by counsel at the trial for his life.

The court denied the motion to substitute counsel without addressing appellant's intent to plead guilty or the conflict with counsel. Moments later, the court addressed its plea inquiry to counsel, who entered a not guilty plea over appellant's objection.

One week later, appellant moved and was permitted to discharge counsel and proceed in propria persona. At two subsequent proceedings, he attempted thereafter to plead guilty (and have counsel reappointed for the

penalty phase). Neither request was granted.

In all likelihood, if the municipal court had accepted appellant's guilty plea, or at least addressed the conflict with counsel, this appeal would not be before this Court. There would have been no guilt phase and no sanity phase, appellant would have been represented by counsel, both pretrial and at the penalty phase, and would have been able to present a credible case for life based on acceptance of responsibility.

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STATEMENT OF THE CASE

On June 17, 1996, the Orange County District Attorney filed a complaint in the Orange County Municipal Court charging appellant with the murder (Pen. Code, § 187) [1] and attempted robbery of Scott Wilson (§§ 664/211/212.5, subd. (b)/213, subd. (a)(2)). One special circumstance was alleged -- that the murder was committed while appellant was engaged in the commission or attempted commission of robbery (§ 190.2, subd. (a)(17)(i)) -- as was a special allegation that appellant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a). (1 CT 64-65.) [2]

On June 18, 1996, appellant made his first court appearance and the Orange County Public Defender was appointed as counsel. (Municipal Court RT 4-5.) No plea was entered on this date. One month later, on July 16, 1996, appellant filed a motion seeking to proceed in propria persona. (987.9 July 17 CT 1.) Five weeks later, on August 22, 1996, at a hearing before the Honorable James M. Brooks, Judge of the Municipal Court, appellant confirmed his desire to proceed without counsel. (Municipal Court RT 9.) The court deferred a decision on the request until October 30, 1996. (Municipal Court RT 15, 17.) No plea was entered at this hearing.

On October 30, 1996, after reserving the right to proceed without counsel, appellant requested a hearing to determine whether substitute counsel

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1. All further statutory references are to the Penal Code unless otherwise stated.

2. The record on appeal is designated herein as follows: "RT" refers to the Reporter's Transcript on Appeal; "CT" refers to the Clerk's Transcript on Appeal. Several volumes of the Clerk's Transcript are designated herein in accordance with the title on the cover page of the volume: e.g., "Supp. CT"; "987.9 July 14 Supp. CT"; "987.9 July 17 Supp. CT"; "Accuracy Supp. CT".

should be appointed. (Municipal Court RT 19-20.) In chambers, he informed Judge Brooks that he intended to waive the preliminary hearing and plead guilty, and to focus on a case for life at the penalty phase; but that his decision was causing a conflict with the Public Defender. But appellant made clear that he did not want to proceed without counsel. The court denied appellant's motion to substitute counsel. (Municipal Court RT 23-26.) Moments later, in open court, counsel entered a not guilty plea over appellant's objection. (Municipal Court RT 28.) One week later, appellant moved to discharge counsel and represent himself at trial. (Municipal Court RT 31-32.) The court granted that motion, and appointed private attorney Edgar Freeman as advisory counsel. (Municipal Court RT 34-35, 38-39.) [3]

On January 23, 1997, during an in camera proceeding before the Honorable Theodore E. Millard, Judge of the Superior Court, appellant sought to plead guilty and have counsel reappointed. The court granted neither request. (Jan. 23, 1997 RT 21-24, 30, 34-36, 41-42.) On January 27, 1997, at a hearing before the Honorable Donna L. Crandall, Judge of the Municipal Court, appellant sought to withdraw the plea made by counsel and to enter a guilty plea. The prosecutor informed him, both off the record and in open court, that by statute he could not do so. The court did not address appellant's request to withdraw the not guilty plea and enter a plea of guilty, or his prior request to have the Public Defender reappointed to represent him.

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3. Mr. Freeman's status fluctuated during the ensuing proceedings. On December 20, 1996, he was appointed as "second counsel." (Municipal Court RT 100-101.) On October 20, 1997, shortly before trial, the trial court vacated that appointment, and appointed Freeman as advisory counsel. (3 RT 386-391.) At trial, Freeman conducted the sanity phase (11 RT 2070), during which appellant testified. At the penalty phase, he conducted the direct examination of appellant (15 RT 2916), and (with appellant) gave a closing argument (16 RT 3151).

(Municipal Court RT 159-162.)

On February 5, 1997, following a one-day preliminary hearing, appellant was held to answer on both counts. (I Supp. CT 40; Municipal Court CT 18-19.)

On February 18, 1997, the Orange County District Attorney filed an information in the Orange County Superior Court charging appellant with the same count of murder and the sole special circumstance alleged in the complaint. The attempted robbery count, however, was not alleged in the information. (1 CT 68-69.) On February 24, 1997, appellant entered pleas of not guilty and not guilty by reason of insanity. (1 RT 4-5.)

On February 28, 1997, the prosecution informed appellant by letter of its intent to pursue the death penalty. (1 CT 106.) The prosecution filed a "Notice of Evidence in Aggravation" on August 25, 1997, and a "First Amended Notice" of the same on October 17, 1997. (1 CT 374-376; 2 CT 541-544.)

Jury selection began on October 21, 1997, before the Honorable William R. Froeberg, Judge of the Superior Court. The People were represented by Orange County District Attorney James Tanizaki. As noted, apart from the sanity phase, and small portions of the penalty phase, appellant represented himself at trial.

Jury trial began on October 29, 1997. On November 12, 1997, following six days of testimony, the jury returned a verdict finding appellant guilty of first degree murder; and found true the attempted robbery felony-murder special circumstance and the firearm-use allegation. (3 CT 808-810; 10 RT 2058-2061.)

Sanity phase proceedings began on November 17, 1997. On November 20, 1997, the jury returned a verdict finding that appellant was sane during the commission of the crime. (3 CT 859, 963-964; 13 RT 2542.)

The penalty phase began on November 24, 1997. On December 3, 1997, the jury returned a death verdict. (3 CT 1084; 16 RT 3220.)

On January 9, 1998, the trial court denied appellant's application for modification of the verdict. (3 CT 1113-1132; 16 RT 3230, 3233-3246.) The court sentenced appellant to death on the single murder count; and to four years imprisonment for the firearm use allegation. (4 CT 1179, 1180-1196.)

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STATEMENT OF FACTS

A. The Guilt Phase

1. The Prosecution Case

The prosecution presented its case chronologically, as follows. On June 13, 1996, the Home Base store in Santa Ana was having a relocation sale and was somewhat crowded. (8 RT 1361-1362.) At approximately 11:30 a.m., one of the cashiers, Maricela Saucedo, received a 50-dollar bill from a customer, and asked the customer service manager, Scott Wilson, for change. (8 RT 1313, 1317-1318.) Wilson walked to the customer service area, behind which was a safe. After turning back to her customer, Saucedo heard a gunshot. She turned and saw a man pointing a gun "up in his hand," then saw him run out of the store while waving the gun around. Wilson was lying face-down on the floor, bleeding, with 10 five-dollar bills in his hand. (8 RT 1318-1319, 1321-1323; 9 RT 1593.) At trial, Saucedo identified appellant as the perpetrator. (8 RT 1322.)

Another cashier, Susan Bernal, saw Wilson walking away from the customer service area, toward the registers, and a man following him. Wilson was not arguing with anyone, and did not call for help or call out that a robbery was happening. Bernal then saw the man shoot Wilson in the head at close range, point the gun toward the registers, and run out the side door. (8 RT 1325-1329, 1380-1382.) In court, she could not identify appellant as the shooter. (8 RT 1330.)

Scott Ellis was also working at the customer service area on the day in question and wore an apron with a name tag that said "Scott E." He heard what sounded like a firecracker, turned and saw Wilson on the ground beyond the customer service desk, and saw a man run past and exit through an entrance to the store. In court, Ellis identified appellant as the man who ran from the store. (8 RT 1333, 1336-1342, 1344.)

Christopher Rodriguez, a "loss prevention agent" at the Home Base store, was at the south exit door when he heard a loud "pop." He looked toward the customer service area, which was 30 feet away, and saw Wilson lying on the floor, and a man 10 feet away from Wilson. (8 RT 1345-1349, 1360, 1364.) The man ran out the north entrance carrying what appeared to be a silver revolver, and Rodriquez followed him around a corner to an alleyway that was used for parking. The man entered the passenger side of a white Toyota van, and, as the van pulled away, Rodriguez memorized the license plate number as 3W18323. (8 RT 1349-1356, 1361-1363.) He testified that appellant appeared to be the man in question, but was not absolutely sure. (8 RT 1358-1359.)

Santa Ana Police Officer Ronald Dryva testified that several hours after the shooting, a man called Home Base and spoke to a store vice-president named Goo. Sometime during this call, Goo handed the phone to Dryva, who continued to speak without informing the caller that a change in interlocutors had occurred. Dryva testified that the caller stated that he had "never killed or shot anyone before," and that "you need to tell your employees that money is not worth getting killed over." (8 RT 1374.) When Dryva asked why he pulled the trigger, the caller responded, "because I was flustrated [*sic*]. He didn't do what I told him." (8 RT 1374-1375.) The caller also described following the victim and:

> While I pointed the gun at him and told him to put the money in the bag, he just started counting the money. I told him not to count the fucking money. I told him to put the money in the box. He just closed the safe and started walking away . . . . [H]e didn't believe I was serious. I got mad, flustrated [*sic*], so I shot him.

(8 RT 1375.) The caller referred to the shooting as a "stupid mistake," and said, "I'll probably turn myself in tonight[.]" (8 RT 1376.)

Santa Ana Police Officer Richard Reese testified that at 5:00 p.m. on

June 14, 1996, the day after the shooting, he was surveilling 13591 Lanning Street in Garden Grove, and saw a white Toyota van in the driveway with the license plate number 3W18393, one digit off from the number given by Rodriguez. [4] When appellant drove the van out of the driveway, Reese followed, stopped, and arrested him without incident. Reese then searched the interior of a camper located at the rear of the Lanning Street property. Beneath a blanket he found a blue nylon makeshift holster with the butt end of a .32-caliber pistol sticking out, and a blue nylon bag with numerous rounds of .32-caliber ammunition. There were five live rounds in the pistol and one empty cylinder. (8 RT 1384-1388, 1398-1400.) Both the arrest and the search of the camper were conducted without warrants. (Accuracy Supp. CT 12-13; 8 RT 1390; see Arg. 4, *post.*)

Santa Ana Police Investigator Phil Lozano testified that on June 14, 1996, shortly after appellant's arrest, he and Investigator Mark Steen interrogated appellant at the Santa Ana Police Department. According to Lozano, appellant was advised of his rights and agreed to speak. (8 RT 1406-1408.) At trial, the prosecution played the audiotape recording of the interrogation. (8 RT 1415; Exhs. 18 & 19.) In the course of the interrogation, appellant confessed to killing the victim and described his actions before, during, and after the shooting. He decided to commit a robbery earlier that

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4. The jury was not told how law enforcement identified appellant as a suspect. According to an arrest report attached to a search warrant present in the record on appeal, the identification was made as follows:

> Investigator Serafin of the Santa Ana Police Department Gang Unit, received information from an Orange County Sheriff's officer, who had been told by an informant, that a "Daniel" living on the first street west of Newhope, next to the 22 Freeway, had committed the above murder.

(Accuracy Supp. CT 12.)

week, after an argument with his grandparents. On June 13, he went to the Home Base, where he identified a manager and followed him to the customer service area. As the manager opened the store safe, appellant said, "excuse me" and then asked, "Can you put that money in this box?" The manager ignored him and began to walk away. Appellant followed and shot the manager in the head at close range. (1 CT 322-342.) [5]

On July 25, 1996, appellant sent a letter to Detective Lozano stating that he wished to provide additional information regarding possible accomplices to the crime. [6] On August 12, Lozano and Investigator Steen again questioned appellant. Appellant gave somewhat disjointed statements regarding other persons purportedly involved in the crime, including John McCanns. McCanns had been living in appellant's camper for several weeks, suggested that appellant take heroin for depression instead of cocaine, procured the pistol used to kill Scott Wilson, suggested the idea of a robbery, knew that appellant was going to commit a robbery, and took the spent casing after the robbery. (4 CT 1248-1251, 1254-1257, 1259-1260, 1275, 1278, 1281-1282.) Appellant later learned that McCanns had turned him in to the police. (4 CT 1246, 1257-1262, 1272.) During this interrogation, appellant again admitted responsibility for the shooting. (4 CT 1246-1248, 1254-1257, 1259-1260, 127-1279, 1281.) An audiotape of this interrogation was also played for the jury. (8 RT 1425, 1428; Exhs. 22 & 23.)

Marla Jo Fisher, a reporter for the Orange County Register newspaper,

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5. The interrogation statements are set forth in more detail in Argument 3, *post.*

6. The letter was addressed "Hey Phil," because appellant had grown up in the same area of Garden Grove as Lozano and felt a "semi-kinship" with the investigator. (2 CT 409.)

testified that she interviewed appellant at the jail the morning after his arrest. [7] She went to the jail as a "regular visitor," spoke to appellant over a phone with no one else present, and identified herself as a reporter. Appellant told her that he entered the store intending to commit a robbery, waited until he saw the manager going to the safe, then approached and demanded money. After the manager slammed the safe shut, appellant shot him out of frustration. He admired the victim's courage, but thought him foolish to defy the request for money. Appellant acknowledged calling the store after the incident and telling an officer that he "blamed the Home Base management for failing to train their managers to immediately hand over money, rather than risking their lives in a robbery attempt." (8 RT 1450, 1452-1456; 1460-1463.)

Dr. Richard Fukumoto, a forensic pathologist in private practice, testified that he performed the autopsy on the victim the day after the shooting. The cause of death was a gunshot wound to the head, at the right temple, in front of the ear lobe. The bullet fractured the skull and damaged the brain, but did not exit the skull completely. There were "stippled markings" in front of and below the wound caused by gunpowder particles impacting the skin. Based on the stippling and the absence of burning on the skin, Dr. Fukumoto opined that the approximate distance from the end of the barrel to the wound was six to twelve inches. (9 RT 1582-1589.)

2. <u>The Defense Case</u>

In his case-in-chief, appellant first called Elizabeth Thompson, a criminalist with the Orange County Crime Laboratory, who testified that she was present at the victim's autopsy and examined the bullet wound with a low-

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7. Before trial, the defense subpoenaed Fisher's notes of the interview. (2 CT 501-503, 516-517.) Following several hearings, the trial court ruled that appellant could not obtain the notes unless Fisher reviewed them before testifying. (3 RT 334-335; 8 RT 1434-1436; see Arg. 5, *post.*)

power microscope. She found "bullet wipe" [8] but no gunpowder particles around the wound, in the wound track, or on the victim's clothes. The absence of gunpowder particles in and around the wound did not necessarily indicate that the pistol was fired from a distance greater than six to twelve inches, as such particles can strike but not remain on the skin. On cross-examination, Thompson opined that the pistol was fired within inches of the skin, not feet. (9 RT 1594-1599.)

As appellant entered a plea of not guilty by reason of insanity, two psychologists -- Dr. Martha Rogers and Dr. Roberto Flores Apodaca -- were appointed by the trial court before trial to examine appellant for the purpose of determining his sanity at the time of commission of the offenses. (1 RT 4-10; 10 RT 1868, 1902.) [9] Although both doctors concluded that appellant was sane at the time of the offense, he called each to testify at the guilt phase.

Dr. Rogers testified that she reviewed numerous records relating to appellant, interviewed him at the jail, and administered psychological tests to measure his general intellectual and psychological functioning. (9 RT 1601-1602, 1609, 1654, 1679-1680, 1692.) She found no neurological impairment and no loss of cognitive function, although her testing suggested a mild impairment in attention. (9 RT 1687, 1703-1705.)

Appellant told Dr. Rogers that he had no recollection of the period between his entry into Home Base and when he ran from the store, and thought that perhaps his memory loss was due to post-traumatic stress disorder resulting from the shooting. (9 RT 1602-1603.) Dr. Rogers concluded, however, that the claimed memory loss was due to malingering,

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8. Dr. Fukumoto defined "bullet wipe" as "a residue that is implanted on the surface [of the skin] as the bullet is entering." (9 RT 1590-1591.)

9. Both reports are in Volume 2 of the Clerk's Transcript: Dr. Rogers's is at page 567; Dr. Flores's is at page 639.

which she defined as "emphasizing something to be more than it actually is or, in the extreme, making something up." (9 RT 1664.) She based that opinion on the circumstances of the crime, appellant's description of the memory loss, the records from his recent commitment to Atascadero State Hospital, and the level of his intellectual and memory functioning. (9 RT 1693-1694.) [10]

Appellant told Dr. Rogers that he was depressed, suicidal, and using drugs in the days before the crime; in her estimation, however, he was carrying out what appeared to be "normal" daily activities. (9 RT 1665-1667, 1671, 1678, 1687.) Although depression can affect a person's ability to form an intent, she "did not get any sense that this was an individual who was disoriented or confused about what was going on." (9 RT 1690.) She could not say that "he wasn't depressed, but he was still able to form intentions and do actions, and was doing so before and after in what appeared to be a reasonably normal manner." (9 RT 1691-1692.)

Dr. Rogers concluded that appellant had no mental disorder that "diminished his capacity to form an intent," and that "intentions were certainly being formed and acted upon both in the time frame immediately before and immediately after the event." (9 RT 1605.) [11] The prosecutor, reprising a theme that he had introduced during voir dire (e.g., RT 930-933, 983-984, 1029), asked whether a lay person using common sense can "look at

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10. Appellant was certified to be a Mentally Disordered Offender and committed to Atascadero State Hospital in July 1995. Details of his commitment were elicited at the sanity phase. (See § B., *post.*)

11. Appellant attempted to have Dr. Rogers and Dr. Flores testify regarding his commitment to Atascadero State Hospital and prior diagnoses and medications given to him by mental health professionals. The trial court, however, repeatedly sustained the prosecution's objections to that line of questioning. (9 RT 1619-1623, 1625-1626, 1631-1636, 1647, 1652-1653, 1653-1655, 1657, 1696-1701, 1704-1705; 10 RT 1881-1885.)

a person's actions before or during the crime" and arrive at the same conclusions as a psychologist. Dr. Rogers agreed. (9 RT 1685-1686.)

Dr. Flores testified that, based on his review of the records, notably two prior neuropsychological evaluations, he concluded that "the possibility of neuropsychological impairment . . . didn't seem probable[.]" (10 RT 1910.) One of those prior evaluations, however, found that appellant had "moderate dysfunction in auditory memory, imagery and comprehension." (10 RT 1913-1915.) Dr. Flores also reviewed the results of two prior administrations of the Minnesota Multiphasic Personality Inventory ("MMPI"), a standard psychological test. In an MMPI administered in 1997, appellant scored highest on the schizophrenia scale, which measures a host of different symptoms and experiences, disturbances in thinking, confusion, some cognitive problems and unusual experiences. An elevated score on that scale raises the possibility of severe mental illness. (10 RT 1876-1880, 1903-1905, 1910.)

Appellant's history indicated severe behavioral problems "from very early on in life," including "arson" at age five. (10 RT 1888-1889.) Intelligence testing performed earlier in appellant's life noted an average to above-average IQ (10 RT 1892), but intelligence, according to Dr. Flores, has only a "very limited correlation with mental illness" (10 RT 1902.)

Dr. Flores diagnosed appellant as having a polysubstance abuse disorder, with an intermittent course, and a personality disorder not otherwise specified, with antisocial and narcissistic features. Both are classified as mental diseases or defects in the Diagnostic and Statistical Manual of Mental Disorders (DSM); yet, a person with these diagnoses can form the specific intent to commit a robbery. (10 RT 1875, 1881-1882, 1904-1905, 1926.)

On cross-examination, Dr. Flores testified that he found no evidence that appellant's "capacity was in any way diminished" at the time of the

offense. (10 RT 1923-1924.) In assessing a person's capacity to form an intent, he stated, a clinician must look that person's conduct before, during and after the incident in question. Concealment of a firearm and entry into a store may or may not indicate planned activity; parking a car in a position for an "easy get away" is also a factor in determining intent; flight from such an incident is an important consideration in a sanity determination. In Dr. Flores's view, nothing in appellant's statements to the police indicated confusion, disorientation, or uncertainty. (10 RT 1915-1919.)

The prosecutor elicited testimony from Dr. Flores regarding appellant's drug use. Appellant told Dr. Flores that he had been purchasing and using methamphetamine with money earned from working for a moving company. (10 RT 1908-1909.) The doctor also testified that in statements to the police, appellant mentioned his use of methamphetamine. When appellant asked whether Dr. Flores had been able to determine whether appellant had been using methamphetamine just prior to the shooting, the trial court sustained the prosecutor's objection. Dr. Flores testified that methamphetamine intoxication can diminish the capacity to form a specific intent. (10 RT 1922-1923.)

Marilee Thompson testified that she lived behind appellant's grandparents and had known him for several years. The week before the shooting, appellant was working on a fence for her, and she went with him to a Home Depot store. When appellant needed to return to the hardware store, Thompson allowed him to borrow her white Toyota van. She later found a bag of latches and hinges in her backyard. (10 RT 1840-1846.) [12]

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12. Several other witnesses testified for the defense. Investigator Lozano testified that he did not recall whether the pathologist had shown him stippling marks around the bullet wound. (9 RT 1714-1717.) Brian Donovan, a customer at Home Base when the shooting occurred, testified that he heard

Footnote continued on next page . . .

Wayne Dapser, an attorney, Naval Reserve Commander, and former prosecutor, also testified for appellant. Dapser submitted an application to an Orange County organization called Volunteers in Parole ("VIP"), to act as a mentor for parolees. In early 1996, he was selected to mentor appellant. (9 RT 1767-1769.)

Dapser testified that appellant lived in a camper off to the side of his grandparents' house. Inside the camper was a bed, a small refrigerator, a cooking appliance, and several dozen volumes of books, including some "classics." At their first meeting, Dapser reviewed appellant's résumé, and discussed appellant's goals and present dissatisfaction with life. Between February and June 1996, Dapser and appellant spoke several times a week, met numerous times, and attended events together. (9 RT 1770-1772, 1779-1782, 1783-1784.)

During these months, Dapser observed "personality changes" in appellant. There were periods of a high degree of optimism when "no matter what happened, you would try and find some way to get past it and to make it positive[.]" There were other times when appellant would enter a deep

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a noise, and saw a man running out of the store holding a white-metal handgun. The man lost his balance and stumbled to the floor without hitting the ground, got back up, and ran out of the store. (9 RT 1720-1721, 1725-1727.) Maricela Saucedo was recalled and testified that she turned around immediately after hearing the gunshot, and saw appellant run out of the store, waving the gun around above his head. Unlike Brian Donovan, she did not see appellant stumble. Nor did she see anything unusual about the gunman's face; he had a mustache, but she could not tell whether he had "facial jewelry." (10 RT 1837-1839.) Sandra McGowan testified that she had been shopping at the Home Base before the shooting and noticed a man who had been in the store for 45 minutes. He had jewelry on his nose and piercings on his face, and was wearing a white tee-shirt, faded jean jacket, shorts, and a baseball hat. (9 RT 1763-1764.) Chris Hood, an employee with the Southern California Cinemas, testified that on June 13, 1996, the movie "Mission Impossible" was not playing at the theater in La Palma. (10 RT 1833-1834; 1 CT 305-306.)

depression over his inability to make things work outside of prison. The depression would frequently last for a day, followed by a renewed enthusiasm in trying to "make a go" of life. Appellant thought that a job would cure his depression; he did not want to fail before having a chance to prove himself. He asked Dapser for money only once, several dollars for gasoline, and repaid the loan several days later. (9 RT 1775-1776, 1781-1782.)

At some point in May 1996, appellant called Dapser and told him that he had used drugs the night before, and was depressed and suicidal. They met at a park, and appellant said that he considered freedom an "albatross" that he did not want. He was depressed because he was used to being in prison with a set of rules, and was having difficulty adjusting to freedom. He was uncomfortable asking for help with activities that others could do easily, and found being on the outside both frightening and frustrating. (9 RT 1773-1775, 1794-1795.) Dapser contacted Janeen Foreaker, who worked at VIP, because he was concerned that appellant might commit suicide. They discussed a plan to have appellant seen by a psychiatrist. After that day in the park, Dapser and appellant met again and discussed many subjects, including appellant's inability to get mental health treatment due to Orange County's bankruptcy. (9 RT 1777-1779.)

On cross-examination, Dapser stated that he did not believe that appellant posed a threat to society: appellant was suicidal, not homicidal. Appellant told him that he had repeatedly turned down requests to become involved in criminal activity. He did not say that such activities were wrong, but it was not where he wanted his life to go. (9 RT 1788-1791.) Appellant never said that he wanted to go back to prison, that he preferred prison, or that he was willing to commit a crime to go back to prison. They played chess together and, although appellant never won, he gave Dapser a "a run for it." Dapser agreed that appellant had fairly good cognitive abilities, including the

ability to communicate and strategize. (9 RT 1792, 1797.)

Appellant's 22-year-old cousin, Nick Peres, testified that he had known appellant for 10 years, although their contact was limited because appellant was often in prison. After appellant was released from Atascadero State Hospital in August 1995, he stayed with Peres and their grandparents, first in their grandparents' house, then in the camper behind the house. (9 RT 1799-1801.)

Peres had seen appellant use illicit drugs, especially methamphetamine, a number of times. He characterized appellant's drug usage as "abnormal[ly]" high, both in frequency and quantity. Peres believed that appellant was trying to kill himself. Around March or April of 1996, appellant was depressed and showed Peres a $10,000 life-insurance policy he had obtained naming Peres and their grandparents as beneficiaries. He asked Peres to kill him or to help him find an assassin and a gun. Perez refused. (9 RT 1802-1805, 1810-1811.)

On cross-examination, Peres testified that by June 1996, appellant seemed more calm and was no longer suicidal or depressed. The day after the shooting, however, appellant seemed depressed. When Peres took him to a hardware store to purchase latches, appellant was neither hesitant or fearful. After appellant's arrest, he told Peres that he tried to commit a robbery and "the guy didn't do what he was supposed to do, and so he got mad and shot him." (9 RT 1810-1813.)

Parole agent Jan Moorehead testified that she had known appellant since he was 14 years old, when she was his probation officer. At that time, appellant had committed a crime, and Moorehead investigated his family background and offered a recommendation to the court. (9 RT 1816-1818.) In August 1995, Moorehead was a parole agent with a "high control" case load, meaning parolees with a high violence potential, sex offenders, possible gang members, and those with mental problems. When appellant was released

from Atascadero State Hospital, he reported to her. He was considered high control not because he was a sex offender, but because of his high violence potential and mental instability. Still, Moorehead determined that he would be seen on an "as-needed basis." (10 RT 1848-1849, 1852.)

Over the next nine months, appellant was tested for narcotics twice per month, and tested positive only once. On one occasion, when Moorehead visited appellant at his camper, he said that he had used drugs, and that he was depressed and suicidal. He had been reading books by Dr. Kevorkian, [13] and writing in a journal about various methods of committing suicide. Moorehead instructed him to rip out those pages and start afresh by writing something positive, such as "I am a successful person and am comfortable with myself." She also gave appellant a book by motivational speaker Anthony Robbins. Appellant did not want to go to the hospital, but promised that if his depression got worse, he would call Moorehead. (10 RT 1848-1853, 1859-1862.)

Moorehead testified that drug counseling services were not available through the parole department; parolees with drug issues were referred to the Salvation Army. Several weeks after their encounter in the camper, she took appellant to the Salvation Army, where he tested clean and was admitted to the program. When she returned from a vacation, there was a message from the facility that appellant had left. (10 RT 1850, 1853-1854, 1859-1860.)

Moorehead spoke about appellant with Janeen Foreaker, who worked at the VIP program. Although appellant had a high violence potential and was "mentally unstable," he was admitted to the that program and matched with Wayne Dapser as his mentor. Moorehead spoke to Dapser several times

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13. Dr. Kevorkian is an advocate for and practitioner of physician-assisted suicide. (See generally *People v. Kevorkian* (Mich.App. 2001) 639 N.W.2d 291.)

about appellant's depression. (10 RT 1854-1856.)

Two weeks before the Home Base shooting, appellant asked Moorehead for help in making an appointment to see psychiatrist Dr. Leo Anderson at the parole outpatient clinic. Appellant was scheduled to see Dr. Anderson shortly before the shooting, but missed the appointment. He told Moorehead that he had been trying to reestablish a relationship with his mother, that she was willing to attend counseling with appellant, and that he wanted to find a counselor on his own. (10 RT 1856-1858.)

The parties entered into two stipulations:

> [Exhibit D] is the life insurance policy application on the life of [appellant] in the amount of $10,000 signed by [appellant] on February 16th, 1996, and that the named beneficiaries are Nick E. Peres, grandfather, and Nick P. Peres, cousin.
>
> [Appellant] purchased miscellaneous hardware, latches and hinges, on June 14, 1996, by check at Plains Lumber located in Garden Grove, 10392 Stanford.

(10 RT 1867.)

The jury was instructed on first degree felony murder, first degree premeditated murder, and second degree murder. (3 CT 772-776.) It returned a general verdict of guilty of first degree murder; and found the attempted robbery felony-murder special circumstance allegation and the firearm-use allegation to be true. (3 CT 808-810; 10 RT 2058-2061.)

B. The Sanity Phase

Appellant testified at the sanity phase that he was diagnosed with attention deficit disorder at age four or five. Because of that illness, he cannot slow his thoughts, which race like a car on high idle. Also, from a very young age, he has been subject to intrusive and involuntary thoughts of violence which tell him to act out and hurt people or destroy things. As a child, he tried to control his behavior when the violent thoughts intruded, and asked the doctors if they could make them stop. At times, he was prescribed Ritalin,

a stimulant which, paradoxically, slowed down his thoughts and made him calm and tranquil; and Mellaril, a drug used to treat schizophrenia and symptoms such as hallucinations, delusions, and hostility. (11 RT 2103-2107, 2109, 2117, 2122.) Later, while in prison, appellant was often prescribed Thorazine, a drug which made him "drool" and nearly "comatose," but allowed him to function in the prison's general population. Throughout his life, up to the time of the homicide in June 1996, he was unable to function without medication as the violent thoughts were always present. (11 RT 2106-2108, 2110-2112, 2114-2116.)

At age 12, appellant began living in a series of foster homes, including the Merlin School for Boys, where he did not get along with the other boys. He attempted suicide while at juvenile hall, but was resuscitated at the hospital. At age 13, his mother committed him to the psychiatric ward of La Habra Hospital because he had been running away, sleeping in the streets, and getting into fights at school. At age 15, he was returned to that hospital. He was diagnosed as a "latent schizophrenic" with explosive personality disorder, and placed on antipsychotic medications. (11 RT 2102-2103, 2174.)

At age 30, on July 1, 1994, 30 days before his scheduled release from prison, appellant was transferred to a facility at the California Men's Colony for prisoners with mental health problems. There, he was interviewed by a staff psychologist, Dr. Steven Moberg, who told appellant that he was being evaluated as a potential Mentally Disordered Offender ("MDO"). [14] Appellant told Dr. Moberg that he was afraid that the intrusive thoughts of violence would lead him to commit violence on the streets. He did not want to

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14. The Mentally Disordered Offenders Act (§ 2960 et seq.) provides that a prisoner adjudicated to be a mentally disordered offender "may be civilly committed during and after parole if certain conditions are met." (*People v. Allen* (2007) 42 Cal.4th 91, 94.)

reoffend and be arrested; nor did he want to become frustrated and commit suicide. (11 RT 2110-2112, 2159-2163.) He was also evaluated by a psychiatrist from Atascadero State Hospital, Dr. Roger Wunderlich. (11 RT 2116-2117.) He told Dr. Wunderlich of his lifelong thoughts of committing violence, and asked to be sent to Atascadero. (11 RT 2113, 2158-2159, 2164.) A hearing occurred before the Parole Board and, based on the doctors' reports, appellant was determined to meet the criteria for an MDO commitment, and was committed to Atascadero. (11 RT 2116-2117, 2164.)

After several weeks at Atascadero, appellant was prescribed Cylert, a stimulant medication similar to Ritalin. (11 RT 2117-2119.) While taking Cylert, appellant's violent, destructive thoughts did not intrude and he functioned well for the first time in his life. He was elected "Ward Senator" by the 40 patients on his ward, and, in that capacity, asked for donations for candy bars and coffee, and held games for other patients. He went to group meetings, volunteered for additional groups, and went to the "Learning Center" for memory and cognitive skills rehabilitation. (11 RT 2121-2125, 2249, 2164.)

According to appellant, however, much of the staff disliked him, believing that he was organizing the other patients to participate in groups and programs. The psychiatric technicians did not like that appellant was more intelligent than they were, and tried to provoke him to act in ways that would result in a loss of privileges. The doctors began taking appellant off of medication and progressively removed the psychiatric diagnoses he had been given. Appellant then challenged the MDO commitment by filing a petition for a writ of habeas corpus. (11 RT 2119-2121, 2124-2125, 2164, 2171-2172.) At a first trial, the jury found that he should remain committed to Atascadero. When that decision was overturned by an appellate court, appellant had a second trial and was recommitted to Atascadero. (11 RT 2165-2166, 2292;

Exh. J [Order of recommitment to Atascadero State Hospital, dated October 14, 1994].)

Appellant testified that an individual from the Orange County Conditional Release Program ("CONREP") [15] interviewed him at Atascadero and stated that the program would not accept him because he was a danger to society and himself. To be accepted by CONREP, he would have to demonstrate an additional year without suicidal ideation and aggression in the hospital, perform 85% of the therapies, and take the medications. Appellant, desirous of admittance to CONREP, went to all his group meetings and signed up for a computer class. Six months later, the CONREP representative told appellant that he still did not meet the criteria for acceptance. (11 RT 2168-2170.)

The circumstances of his release from Atascadero were confusing to appellant. He believed that Dr. Phillip Kelly, a staff psychiatrist at Atascadero, together with the local prosecutor, effectuated his "return to sanity." On August 22, 1995, after his release from Atascadero, appellant reported to his parole agent, Jan Moorehead. He was considered "high control" because of his history, and lived in a camper outside his grandparents' home. (11 RT 2166-2169, 2172-2172, 2178.)

Within a week of his release, appellant had thoughts of suicide and tried to obtain psychiatric counseling. He saw a psychiatrist, Dr. Anderson, but was told that he did not need to be seen again. By February 1996, he was overwhelmingly depressed and suicidal. He tried to obtain counseling, but was thrown "back out on the streets[.]" In February 1996, he purchased an

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15. Subsequent testimony established that CONREP is part of an Orange County health care agency that provides public safety and clinical services to persons adjudicated not guilty by reason of insanity, or to mentally disordered offenders. (12 RT 2283-2284.)

insurance policy and asked his cousin Nick Peres to kill him. Peres refused. Appellant started taking notes on how to commit suicide. When he showed those notes to his parole agent, she told him to change his thinking and write something "affirmative." (11 RT 2173-2178.)

For several weeks prior to the Home Base shooting, appellant was doing handyman work for Marilee Thompson. He found a homeless person, John McCanns, to assist him with this work, and allowed McCanns to live in appellant's camper. (11 RT 2173, 2179-2180.) Shortly before the shooting, in June of 1996, appellant tried again to see Dr. Anderson, but his car broke down on the way to the appointment. His next appointment was scheduled for June 13, the day of the Home Base shooting. (11 RT 2173.)

The night before the shooting, appellant decided to commit suicide and bought a pistol "on credit" for $350. He brought the pistol to his camper and asked McCanns to kill him; McCanns declined. (11 RT 2174-2176.) Early that morning, appellant drove McCanns to a methadone clinic, then gave him a ride to the city of Stanton. Appellant could not recall whether he had ingested any methamphetamine or other drug during that time. He drove on the freeway and ended up at the Home Base store, where he was going to use his checkbook to buy hardware for Marilee Thompson. He parked in the alleyway because there were no other parking places available due to the store's relocation sale. (11 RT 2179-2183, 2185, 2187-2189, 2220-2222.)

When appellant entered the store, he was carrying the pistol in a homemade holster. When asked why he brought the gun with him, he stated that the obsessive idea of suicide was still embedded in his mind, and that:

> You know, if -- if I find the -- the opportunity to -- to do what I wanted to do, maybe. I mean, I didn't want -- I mean, the last thing I would have wanted for my grandparents to hear a noise and come running out into the backyard and see me leaking my --

(11 RT 2184.) He did not need money and was not carrying the pistol to

commit a robbery. Despite what he told the interrogators, he did not plan to rob the store. (11 RT 2183-2187, 2189.)

Appellant told the interrogators that when he was inside the Home Base store, he looked around a while, saw the name tags of two persons named Scott, and saw one of them open a safe. Appellant was at the customer service desk, not leaning against a display case so that the victim could not see him, and did not have a box or a bag with him. (11 RT 2189-2190.)

He had no explanation for his outburst of violence toward the victim, and could not explain what his thoughts were at the time of the shooting. He told the interrogators that he was angry because he "had to tell 'em something." He could not say whether he was acting on the violent thoughts with which he had been plagued his entire life, as he did not have very good recall of those thoughts. (11 RT 2189-2191, 2193, 2195.)

After fleeing from Home Base, appellant drove for several hours, swearing to himself, and trying to come to an understanding of what had happened. He saw a police vehicle in front of him, and changed highways. His "civilized self" invented the robbery scenario in an effort "to come up with a plausible excuse for what I did that made no sense." (11 RT 2191-2194.) He telephoned the store to find out exactly what had happened, and thought that he was speaking to a Home Base vice-president named Goo. Appellant was "mad and frustrated", and yelled that "I'm the son-of-a-bitch who shot him, and you gotta tell me what happened." He berated Goo that the employees should be trained to give up money during a robbery. When Officer Dryva took the telephone and continued the conversation, appellant did not realize that he was speaking to a police officer. When Dryva asked him what he was going to do, appellant replied that he would either turn himself in to the police or commit suicide. (11 RT 2193-2196.)

After the call, appellant drove back to his camper. He called his cousin and told him that he had killed someone, but his cousin did not believe him. Appellant held the loaded pistol under his chin, but could not pull the trigger. He read about the crime in the morning papers, and learned that he had spent 45 minutes in the store, and that the manager was getting change before the shooting. (11 RT 2196-2197.)

The prosecutor's cross-examination of appellant began with several juvenile theft incidents. [16] Appellant did not remember stealing cigarettes from a store in 1977 when he was 14 years old. At age 15, in June 1978, he purchased a moped that he did not know had been stolen. In May 1979, appellant and three others, including two adults, stole clothes from a store. At age 17, in 1980, he was arrested for possessing a stolen moped, and pleaded guilty to receiving stolen property. He was in the Navy at the time and had to plead guilty to be released or he would have been charged with desertion. He was discharged from the Navy several months later for improper conduct. In 1981, he stole a Honda Civic. He knew that was wrong, and pleaded guilty. In February 1982, at age 19, he committed an armed robbery of a market in Anaheim because he "wanted money." (11 RT 2198-2201.)

Appellant affirmed that at age 21, in September 1984, while in prison, he was charged with stabbing an inmate during an incident that arose out of a gang war with Cuban prisoners. Although he was not the person who stabbed the inmate, he pleaded guilty to having done so. In May 1991, after his release from prison, he was involved in an incident which resulted in a stabbing.

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16. During a break in appellant's testimony, the prosecutor announced that he would seek to introduce evidence of three juvenile petitions that were sustained against appellant for theft-related incidents. Over appellant's objections, the trial court ruled that the evidence was admissible. (11 RT 2127-2129.)

According to appellant, his next-door neighbor, Curtis Von Durham, "sold" his sister to one James Reid, who left with her but refused to pay. Von Durham asked appellant to help and appellant agreed. They confronted Reid, and when Reid started beating up Von Durham, appellant "tried to intervene." (11 RT 2202-2206.) After their arrest, Von Durham's family offered appellant money if he would plead guilty to the charges. Appellant agreed because he was not afraid of returning to prison, and needed an "excuse" to do so. (11 RT 2206.)

When asked whether he liked it in prison, appellant stated that "[i]t's not a matter of liking it there. It's -- I --," but was interrupted by the prosecutor. Appellant denied attempting to rob the Home Base store out of desire to return to prison. (11 RT 2194, 2207.) He denied seeking admittance to Atascadero or CONREP to receive, what the prosecutor referred to as, "extra" mental health benefits. (11 RT 2211-2212.) Appellant believed that when he was adjudged to be an MDO, he was found to be "insane." When Dr. Kelly requested that appellant be released from Atascadero, the Department of Mental Health in Sacramento decided that appellant had not been returned to sanity. (12 RT 2229-2230.)

Appellant was also cross-examined regarding testimony he gave shortly before his capital trial, when he testified as an expert witness in a separate case. [17] When the prosecutor in that case asked whether appellant considered himself insane at the time of the homicide, appellant replied that he had never

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17. Appellant's former attorneys from the Orange County Public Defender asked him to testify in a separate trial as an expert witness on gangs. Coincidentally, the separate trial was presided over by the same judge who was presiding over appellant's trial. During a hearing on the matter, the trial court asked appellant whether he was "willing to waive any conflict that may exist between me hearing your testimony in the [separate] matter and then presiding over your trial?" Appellant responded in the affirmative. (2 RT 301-306.)

considered himself insane, but that the question was for the jury to decide. (11 RT 2207-2209.) During that testimony, appellant acknowledged having made "self-serving statements" to Dr. Moberg regarding violent thoughts of shooting up a shopping mall full of people in order to be admitted to Atascadero. But he had told other doctors before Dr. Moberg about those violent thoughts. (11 RT 2210-2211.)

With regard to the shooting at Home Base, appellant testified that, on the early morning of June 13, he was in his camper and was "tweaking" on methamphetamine that he had ingested on Tuesday. [18] His thoughts were preoccupied with the pistol he had obtained, which felt like a "big presence" in the camper. He made the holster to carry the pistol, not because he planned to rob Home Base, but because he planned to shoot himself. When asked why he needed a holster for that, appellant could give no further explanation. (11 RT 2214-2217.)

Appellant remembered entering the store, being at the customer service desk, and knowing that the manager's name was Scott. Next, he experienced "sensations" of a flame and of falling. He recalled running out of the store and nearly bumping into an elderly woman. (12 RT 2219, 2241-2244.) He told Doctors Rogers and Flores, however, that he had no recollection of the events. (12 RT 2239-2240.) He acknowledged having a very good memory in general, and agreed with the prosecutor that he (appellant) was a "fairly high-functioning individual[.]" (11 RT 2212-2213.)

Appellant testified that he was not a willing participant when he was interrogated by investigators Lozano and Steen. They were trained

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18. In response to a question from the trial court, appellant explained that the term "tweaking" refers to withdrawal from methamphetamine; when methamphetamine users are in withdrawal, they have an "inane need to create or do things or make things[.]" (11 RT 2222-2223.)

interrogators and were trying to confuse him, while he was filled with guilt about shooting the victim. (12 RT 2236, 2239.) He could not tell them what he had done at the store, because he did not know what he had done. (12 RT 2237.) He talked about his involvement in the shooting because he wanted to give an explanation of what happened, wanted to convince them that he had committed the crime. (12 RT 2231-2232.) He told the interrogators that he saw the victim, whose name was Scott, go to the safe; when Scott did not turn over the money, appellant shot him because he was mad and frustrated. (12 RT 2237-2238.) He also told them that he had been in the store for 45 minutes, a figure that he learned from newspaper articles the morning after the killing. When the prosecutor, unconvinced, showed him the articles, appellant pointed out that one article said 30 minutes and the other said one hour. (12 RT 2244-2246.)

Next, Dr. Wunderlich testified for the defense that, in 1994, he was a staff psychiatrist at Atascadero State Hospital and conducted MDO evaluations. On June 17, 1994, he examined appellant to determine whether appellant met the six criteria required for an MDO commitment. He interviewed appellant for 30 minutes, and relied on the records and appellant's statements in making that determination. (11 RT 2129-2132, 2144.)

Dr. Wunderlich concluded that appellant met the six criteria. The first criterion, a severe mental disorder, was met by the doctor's diagnostic impression of attention deficit/hyperactivity disorder ("ADHD"), which persisted into adulthood; and by a conduct disorder, because appellant had initiated physical fights and had used a weapon in more than one fight. (11 RT 2134, 2137-2138.) The second MDO criterion, an offense involving force or violence, was met by the fact that appellant stabbed a person during a crime. (11 RT 2145, 2147.) The third criterion, that the mental disorder was a cause or aggravating factor in the underlying crime, was met based on

appellant's statements that the violent thoughts resulted in the assault. (11 RT 2144-2145, 2147-2148.) The fourth criterion, that the condition was not in remission, was met both by the ongoing violent thoughts and impulses reported by appellant, and by the fact that it is questionable whether appellant's mental disorder can be placed in remission by medication. (11 RT 2136-2137, 2139, 2147-2149.) The fifth criterion, that appellant had been in treatment, was met based on the medications he had taken and his attempts at "self-treatment," and apparent reference to appellant's use of illicit drugs. (11 RT 2148-2149.) The sixth MDO criterion, the person represents a substantial danger of physical harm to others because of the mental disorder, was met based on appellant's description of his violent thoughts of harming people. (11 RT 2139-2140, 2149.) Appellant wanted treatment and was afraid of what he might do if paroled. According to the doctor, if appellant had not been certified as an MDO, he would have been released to "the streets." (11 RT 2141-2142.) On the basis of Dr. Wunderlich's certification that the six criteria for an MDO commitment were met, appellant was committed to Atascadero. (11 RT 2139-2140; Exh. E [MDO certification].)

On cross-examination, the prosecution asked Dr. Wunderlich whether:

> the basis of your determining that [appellant] had a severe mental disorder was the fact that he told you that he had these violent fantasies, and you, in an abundance of caution, just took him at his word and said, "if you have that type of fantasy, you've got a mental disorder," is that the bottom line to this?

(11 RT 2146.) The doctor agreed, although appellant's assaultive behavior was confirmed by court records. (11 RT 2146.) Dr. Wunderlich believed that appellant had a severe mental disorder. But he found appellant to be a coherent, fairly intelligent person. He had no knowledge of appellant's mental state at the time of the Home Base shooting. (11 RT 2148-2149, 2154-2157.)

In response to a question from the prosecutor, Dr. Wunderlich confirmed that he had testified in other cases regarding sanity and was aware

of the legal definition of that term. Over objection, he testified that appellant could distinguish right from wrong. (11 RT 2152-2155.)

Dr. Joseph Wu, a psychiatrist at the University of California, Irvine ("UCI") Brain Imaging Center, testified that he was hired by the defense to perform a positron emission tomography ("PET") scan on appellant. A PET scan utilizes functional neuroimaging to detect brain abnormalities. (12 RT 2254-2259.) PET is a valuable tool because it provides objective biological data to corroborate a specific psychiatric diagnosis, and provides information that is helpful in making clinical judgments regarding behavior. (12 RT 2277, 2280, 2426-2427.)

On November 14, 1997, after reviewing numerous reports on appellant, Dr. Wu performed the PET scan and attempted to correlate the clinical significance of the scan with appellant's clinical history. (12 RT 2383-2384, 2400-2401, 2422-2424.) The PET scan revealed two significant abnormalities in appellant's brain: an abnormal decrease in metabolism in the frontal lobes; and an abnormal increase in metabolism in the temporal lobes. (12 RT 2270, 2272.)

Appellant's brain showed little activity in the frontal lobes, indicating a significant impairment in frontal lobe function. (12 RT 2267-2268.) The frontal lobes are "involved with things like being able to think properly, being aware of the consequence of your actions, being able to sort of inhibit inappropriate impulses." (12 RT 2270, 2399.) Decreased metabolic activity in the frontal lobes has been reported by several researchers to be present in persons with ADHD, and Dr. Wu was satisfied that the decreased metabolic activity in appellant's frontal lobes was consistent with that disorder. (12 RT 2267-2268, 2275, 2388-2389.) The fact that appellant's PET scan was abnormal and that the abnormality was consistent with ADHD strengthens the basis for that diagnosis. According to Dr. Wu, many clinicians have

reported that a person with ADHD has a poor ability to control inappropriate and aggressive impulses. If not treated with medication, persons with ADHD are at a higher risk for criminal activity and substance abuse. (12 RT 2268, 2277, 2388-2389.)

The second abnormality revealed by the PET scan was an unusually high degree of metabolic activity in the temporal lobes of appellant's brain: nearly twice as high as normal controls. The temporal lobes are the "primitive part of the brain" that regulate fear and aggression. An unusual increase in temporal lobe metabolic activity has been associated with a history of aggressive or violent behaviors. Thus, the temporal lobe abnormality in appellant's brain is consistent with a difficulty or inability to regulate aggressive instincts, and is consistent with a diagnosis of explosive personality disorder. (12 RT 2268-2270, 2278; 13 RT 2389, 2392-2395.)

Dr. Wu testified that it is very difficult, if not impossible, for a patient to malinger the results of a PET scan. Although drugs can affect the scan, Dr. Wu requested that appellant not be on medication during the test, and there was no indication that he was on medication during the test. Major depression and anxiety can also affect the scan, but there was no indication that appellant was depressed or anxious to that extent. (12 RT 2279-2280; 13 RT 2401-2409.)

Dr. Wu acknowledged that while not everyone with ADHD commits crimes, reports suggest that the risk is much less if the person has a stable family and medical treatment. The literature also suggests that an individual who does not receive proper treatment has a much higher risk of becoming involved in criminal behavior. (13 RT 2404-2405.)

The trial court questioned Dr. Wu in an attempt to "distill [his] testimony to something relevant for the issues in front of this jury." Dr. Wu confirmed that he conducted no formal diagnostic assessment of appellant; he

was asked to determine whether appellant's brain metabolism was consistent with previously diagnosed brain or psychiatric disorders. He also confirmed that, in his opinion, the increased metabolic activity in the temporal lobes "would tend to indicate an increased level of aggression" in appellant. (13 RT 2430-2432.)

Stephen Clagett testified that he had a master's degree in counseling and had worked at an Orange County health care agency for seven years. In 1995 and 1996, he was a therapist with CONREP, which provided public safety and clinical services to persons adjudicated either not guilty by reason of insanity or mentally disordered offenders. His primary responsibility was to determine, depending on the "level of dangerousness" posed, whether a person should be returned to the hospital or to the community. (12 RT 2282-2284.)

In May 1995, Clagett was called upon to determine whether appellant could be safely returned to the community from Atascadero State Hospital. He interviewed appellant, reviewed clinical and other records, and discussed the case with the clinical staff. Appellant was cooperative and coherent: there was no evidence of a thought disorder, hallucinations, or suicidal or homicidal ideation. Appellant acknowledged having "played up" those symptoms in the past out of a desire to be admitted to Atascadero. Notes from the Atascadero staff indicated that appellant was manipulative. (12 RT 2284-2285, 2289-2290, 2292.)

In July 1995, Clagett formed the opinion that appellant did not meet the criteria for release to the community. He believed that appellant continued to represent a danger to the community, and recommended in-patient treatment for another year. The final decision was made by the CONREP team and a forensic coordinator. Clagett knew of a hearing regarding appellant's possible release from Atascadero, but had no further

contact with him. In August 1995, when appellant was released to the community, he was not eligible to receive therapy, treatment or counseling through CONREP. (12 RT 2286-2291.)

Drs. Flores and Rogers were recalled and testified for the prosecution in its sanity phase case-in-chief. Dr. Flores concluded that appellant did not have any mental illness that impacted the ability to distinguish right from wrong, and that appellant's mental status at the time of the offense did not meet the criteria for insanity under section 1026. (12 RT 2333-2334.) He based his opinion on the records, particularly the June 14, 1996, police interrogation of appellant. (12 RT 2297, 2313.) At an interview 10 months after the shooting, appellant told Dr. Flores that he had not planned on going inside the Home Base, but said little about his behavior inside the store. Dr. Flores quoted appellant as saying, "I ran in and I ran out. I don't even know all that happened. I can't say what happened in there. I have everybody else's perspective from reading all about my case." (12 RT 2297.)

Dr. Flores diagnosed appellant with polysubstance dependence with an intermittent course. Although appellant confirmed that he was using drugs and was "tweaking" during the time leading up to the incident, Dr. Flores believed that the drug use had "minimal to some" impact on the sanity issue. (12 RT 2300-2301, 2331-2333.) He also diagnosed appellant as having a personality disorder with narcissistic and antisocial features, a separate diagnostic category from antisocial personality disorder. (12 RT 2299-2301, 2308-2309.)

Dr. Flores reviewed the diagnoses given to appellant by other clinicians between 1994 and 1996, including ADHD, organic personality disorder, and schizo-affective disorder. He found the prior diagnoses of ADHD to be debatable, but not relevant to the issue of sanity. There was a good case that appellant had inattentiveness and distractibility, symptoms which can be

exacerbated by drug use. (12 RT 2301-2304, 2338.) A number of reports by prior clinicians described appellant's violent thoughts, including going into a mall and shooting people, but Dr. Flores gave them only "a little weight." (12 RT 2309-2311, 2314, 2333-2337.)

In Dr. Flores's view, the Home Base shooting was not a response to appellant's violent thoughts, but rather "one step along the sequential continuum of having an image in mind and committing the act." (12 RT 2335-2336.) In assessing the facts of the crime as relevant to an understanding of appellant's thinking processes, Dr. Flores was mindful that the store was large and crowded, that the crime occurred during the middle of the day, and that appellant wore no disguise. He acknowledged that it was not the most "sophisticated act," but believed that these facts did not rise near the level necessary to negate the elements required by section 1026 to establish insanity. (12 RT 2319-2325, 2330-2331, 2339-2340.)

Dr. Rogers testified briefly that, in her opinion, appellant was sane at the time of the offense. She based that opinion on appellant's reported behavior and thought processes before, during, and after the offense. (12 RT 2342-2344, 2346.)

Dr. Phillip Kelly, a staff psychiatrist at Atascadero, testified for the prosecution that he was assigned to the hospital's MDO ward, and was familiar with MDO procedures. When a person is about to be paroled but represents a danger to the community because of a severe but treatable mental disorder, he is examined by clinicians from the Department of Mental Health and from the California Department of Corrections (CDC). If the clinicians find that an MDO commitment is appropriate, the chief psychiatrist at the CDC then reviews the case and decides whether to certify the MDO finding to the Board of Prison Terms. (13 RT 2433-2434, 2456.)

Dr. Kelly confirmed that, in June 1994, appellant was evaluated by Dr.

Moberg from the CDC and by Dr. Wunderlich from the Department of Mental Health, and each certified that appellant met the criteria for an MDO commitment. Dr. MacGregor, the chief psychiatrist at the CDC, reviewed the records and also certified that appellant met the MDO criteria. (13 RT 2456-2457, 2472.) Appellant was committed to Atascadero and was on the MDO ward between July 1994 and September 1995. He had some contact with Dr. Kelly almost daily, whether in passing or at community meetings where patients and staff meet to discuss problems on the ward. (13 RT 2435-2436, 2445.)

At the time of his commitment to Atascadero, appellant was taking Depakote, an anticonvulsant medication that "smooths" out brain waves associated with violent activity. Appellant was then prescribed Cylert for ADHD, to see whether that medication could calm and smooth his behavior. Cylert is a stimulant medication, but has the opposite effect on a person with ADHD. (13 RT 2469-2472.)

Dr. Kelly confirmed that appellant had success on the ward and was elected "Senator" by the other patients. Appellant made appropriate promises to his peers and attempted to carry out them out. (13 RT 2462-2463.) When appellant felt "explosive rage," he would ask to be placed under external restraints, after which he calmed down rapidly. (13 RT 2481-2482, 2497-2499.)

However, Dr. Kelly was not particularly excited to have appellant on the ward. He viewed appellant as a manipulative and disruptive patient who was "splitting" the staff and agitating other patients. (13 RT 2440, 2464-2467, 2475, 2488, 2498-2499.) Appellant admitted to manipulating the clinicians into admitting him to Atascadero because he felt that he could not "make it on the streets" and needed treatment. (13 RT 2437-2439, 2497.)

Without a severe mental disorder, appellant would be released from the

hospital and Dr. Kelly would be "done with him." Thus, Dr. Kelly began revising and removing appellant's admitting diagnoses. (13 RT 2475.) The diagnosis of ADHD by history, as found by Drs. Moberg and MacGregor, was removed due to neuropsychological testing, appellant's response to treatment, and his behavior. (13 RT 2445-2448, 2470-2472, 2475, 2489-2490.) In any event, Dr. Kelly was of the view that ADHD was not a "severe" mental disorder. (13 RT 2490-2491.) Although certain clinicians had noted the possibility of an organic brain disorder, Dr. Kelly removed this diagnosis because a neurologist found that appellant had only minor problems with auditory material, and appellant's cognitive profile revealed robust functioning. (13 RT 2440-2441, 2450, 2455.) Dr. Kelly ruled out a diagnosis of "intermittent explosive disorder" because the assaultive acts in the appellant's past were planned, somewhat dramatic, and under control. The doctor ruled out the diagnosis of conduct disorder given by Drs. Moberg and Wunderlich because that diagnosis applies only when the patient is under age 18. Although appellant reported homicidal ideation and often thought of "shooting up a mall," in Dr. Kelly's opinion this did not rise to the level of a severe mental disorder. (13 RT 2477, 2484-2489.)

Dr. Kelly never spoke with Drs. Moberg or MacGregor about appellant. When he discussed appellant with Dr. Wunderlich, the latter expressed concern that, without psychiatric treatment, appellant was unable to control his aggressive impulses outside of a structured setting. Since appellant wanted to come to Atascadero, Dr. Wunderlich decided that he would diagnose a conduct disorder, which "might fly" as a severe mental disorder. (13 RT 2474, 2477-2478, 2496-2497.) Dr. Kelly, however, diagnosed appellant with antisocial personality disorder and substance abuse disorder. (13 RT 2441, 2477-2478.) As a result of Dr. Kelly's revision and elimination of the admitting diagnoses, appellant was made ineligible for an MDO classification

and, ultimately, was discharged by a court. (13 RT 2442-2443, 2445-2447, 2482-2483, 2488.) He concluded that appellant represented a danger to the community from the personality disorder, but did not recommend ongoing psychiatric treatment because he was of the opinion that appellant did not have a mental illness. Soon after the Home Base shooting, Dr. Kelly became aware that appellant had been charged with murder. (13 RT 2442-2443, 2493-2495.)

The jury found that appellant was sane during the commission of the crime. (3 CT 959, 963-964.)

C. The Penalty Phase

1. The Prosecution Case

The prosecution presented fourteen witnesses at the penalty phase, four of whom testified regarding appellant's prior criminal activity.

Jeff Tawasha testified that during the afternoon of October 25, 1981, he was working at the Freeway Park Market in Anaheim when a young man with a woman's stocking on his face threatened to shoot him with a sawed-off shotgun during a robbery. When a customer walked in during the robbery and started screaming, the man made her go behind the counter. After the man left with the money, Tawasha followed him until the man was arrested by the police. The prosecution introduced a "969(b) package" [19] as evidence of appellant's involvement in the robbery. (14 RT 2561-2565; Exhs. 58 & 62.)

Grant Henry testified that on January 12, 1983, he was working as a correctional officer at the state prison in Chino and conducted a search of a jail cell which housed inmates Daniel Perez [20] and Antonio Mezcua. During

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19. Section 969b provides that certified "copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary" may be introduced as "prima facie evidence" of a prior conviction.

20. The prosecution later introduced testimony that appellant was also

Footnote continued on next page . . .

the search of a locker, he found a "shank" [21] and letters belonging to Perez. At a classification hearing, Perez was found responsible for the shank. Henry acknowledged that it was not unusual to find shanks in prison and that inmates sometimes claimed ownership so that a cellmate was not charged. Appellant told him that he needed the shank for protection. (14 RT 2627-2634.)

Rick Martinez testified that on March 7, 1984, while working as a correctional officer at the state prison in Tracy, he was standing in the "sally port" talking to an inmate named Hernandez when an inmate named Peres entered and repeatedly punched Hernandez, who fell to the ground, soaked with blood. Another officer later searched appellant and found sharpened tweezers that had been broken in half, with wax on the end. At trial, Martinez testified that appellant resembled the perpetrator. Martinez did not recall being briefed that the Mexican gangs were at war with the Cubans, and that Hernandez was likely to be stabbed. However, in the early 1980's, there were many stabbings and assaults at the prison, including an incident on the main yard involving Cubans and other inmates. The prosecution introduced court documents as evidence of appellant's involvement in the stabbing. (14 RT 2656-2668; Exhs. 61 & 62.)

Bradford Blakely testified that he was a deputy sheriff at the Orange County Jail on November 15, 1990, when he found a five-inch long shank made from a mop bucket handle during the search of a cell assigned to appellant. The prosecution introduced court documents of appellant's guilty plea as evidence of his involvement in the incident. (14 RT 2648-2655; Exh.

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known as "Daniel Peres." (14 RT 2645.)

21. The term "shank" is institutional slang for a hand-crafted stabbing implement. (14 RT 2654.)

60.)

Two witnesses testified regarding statements appellant made after the capital crime. Reporter Marla Jo Fisher was recalled and testified that appellant told her that one of the reasons for the attempted robbery was because he had been raised in institutions, had spent many years in prison, did not like life on the outside, was more comfortable in prison, and wanted to return there. When asked by the prosecutor whether appellant showed remorse, Fisher said that he did seem sorry to have shot the victim, but thought that it was the fault of store officials for failing to teach their employees to hand over money and not argue during a robbery. (14 RT 2573-2575.)

Santa Ana Police Department Investigator Mark Steen testified that he was present with Investigator Lozano during the June 14 interrogation of appellant. Using a transcript of the interrogation, Steen testified that appellant made the following statements:

> He had not fired the gun in the last couple days.
>
> He did not recall the last time he was at the Home Base.
>
> He shot the victim because he was "pissed off."
>
> When asked about suicide, he said "I couldn't kill myself. I can kill somebody else, but not myself."
>
> The purpose of the robbery was because he was "tired of being broke all the time" and "just wanted to be rich."
>
> He became frustrated with life and said "Fuck it, man. If I get caught, I'll go back in for about two or three years then, and you know."
>
> When asked whether he had been under the influence of drug or alcohol, appellant said "No, no. I was -- I was in my right mind."

(14 RT 2577-2581.) Appellant was "emotional" at one point during the interrogation. (14 RT 2583-2584.)

Orange County Assistant District Attorney Chris Kralick testified that

on October 8, 1997, he was prosecuting a homicide case in which appellant testified as an expert witness for the defense on the subject of gangs. When Kralick asked appellant whether he considered himself insane at the time of the Home Base shooting, appellant replied in the negative, but stated that the issue was for the jury to decide. When Kralick asked appellant how many times he stabbed James Reid during the 1991 assault, appellant stated "I've admitted to stabbing him six times." When Kralick questioned him about his Atascadero commitment, appellant admitted making "self-serving statements" about his violent thoughts in order to be admitted to the hospital. (14 RT 2639-2646.)

The prosecution presented four expert witnesses regarding appellant's mental health.

Dr. Flores was recalled and testified that appellant's history was consistent with a personality disorder, the essential diagnostic features of which are a persistent disregard and violation of societal rules, a lack of remorse, and an intact intelligence. The impact of the personality disorder on appellant's "free will" was minimal or non-existent. (14 RT 2672-2673, 2689.) On cross-examination, Dr. Flores testified that he did *not* diagnose appellant with antisocial personality disorder, but rather with a personality disorder having narcissistic and antisocial features. Nor did he make a diagnosis of ADHD, although he acknowledged that there was an honest difference of opinion as to whether that was an appropriate diagnosis for appellant. He ruled out explosive personality disorder. (14 RT 2683-2686.) He also ruled out schizophrenia, but acknowledged that other clinicians had suggested such a diagnosis, and that appellant's score on the schizophrenia scale of the MMPI was atypically high, placing him in a percentile ranking of 99.5%. (14 RT 2673-2679, 2681-2682.) The fact that appellant had received psychiatric diagnoses and been placed on psychotropic medications since age five was not

indicative of a "severe" mental illness, as medications could be for mild conditions. (14 RT 2680-2681, 2689, 2691.)

Dr. Hannah MacGregor, a senior CDC Psychiatrist and oft-acting chief of psychiatry, testified that she was involved in MDO certifications, and had the responsibility to review the evaluations from the CDC and Department of Mental Health clinicians to ensure that the inmate met the criteria for a certification. She is required to trust that what the clinicians report is true, but she is not just a "rubber stamp." Appellant's MDO certification meant that he was considered to have a mental illness that affected the commission of his crime, and was required to be placed at Atascadero for treatment rather in the community. (15 RT 2732-2737.)

Dr. Leisa Howell, a clinical psychologist at the CDC for 40 years, testified that she worked at the Chino State Prison reception center in the early 1980's, performing psychological evaluations as part of an overall determination of whether a person is suitable for either community probation or state prison. In 1982, 15 years before this trial, Dr. Howell performed such an evaluation on a 19-year-old Hispanic man named "Daniel Perez." She could not recall the evaluation, but was shown a 3-page report which she had authored, according to which Perez had been referred for evaluation after convictions for false imprisonment, simple assault, robbery, and burglary. (14 RT 2594-2601, 2607.)

A variety of tests were administered to Perez, including an MMPI, an IQ test, and a personality test. On the Army General Classification test, Perez scored a 104, which is considered average. His reading and math scores were also average. There was no indication of psychosis and no gross signs of brain damage. According to Dr. Howell's report, Perez stated that he committed the robbery because he could not find work and needed money to stop being a burden on his grandparents. He reported having been involved with

narcotics and methamphetamine, and having been given various medications in hospitals. The report noted that a jail psychologist had labeled Perez as a "homicidal maniac" who had homicidal tendencies toward everyone. Still, Dr. Howell found that he had "potential for having pleasant personality characteristics," although he "blamed everything on everybody for his difficulties." (14 RT 2601-2603, 2608-2613, 2616-2617, 2621-2625.) The report indicated her diagnostic impressions as antisocial personality disorder, which she defined as "[a] person who is hedonistic in doing what he wants to do, when he wants to do it, regardless of the results of his behavior upon others. It's a lack of conscience type of behavior set." (14 RT 2604-2607.) The report concluded that it was "extremely unrealistic to expect this man to be able to make a satisfactory adjustment in free society" and recommended an adult commitment to the CDC. (14 RT 2607, 2613.)

Dr. Helen Mayberg, a neurologist and a professor of medicine at the University of Texas, San Antonio, specialized in functional imaging research and testified for the prosecution regarding the PET scan performed on appellant. (15 RT 2741-2749, 2809.) She was highly critical of Dr. Wu's methods and testimony.

Dr. Mayberg found Dr. Wu's use of trained technicians to measure performance by observing the subject to be a "crude" way to measure. She found that Dr. Wu's putative failure to score appellant's test to be a "potential problem" in interpreting scans. (15 RT 2755-2756.) She labeled as "false" Dr. Wu's testimony that "[a]nxiety has not generally been reported to be associated with . . . significant frontal lobe decreases . . . in a consistent peer reviewed fashion." She referred to an article published in the 1980's (she could not remember the name) which she was "pretty certain" had been peer reviewed, and which concluded that low anxiety had little effect on PET scans. As anxiety elevates, the frontal lobes are more metabolically active; but

when a person is "super anxious," frontal lobe metabolism decreases. (15 RT 2760-2761.)

Dr. Mayberg was "troubled" by Dr. Wu's testimony that appellant did not seem depressed and that he saw nothing in the reports indicating that major depression was a consideration. A patient's major depression or even mood changes can affect a PET scan, and an examination is required to rule out depression. (15 RT 2757-2759.) She admitted, however, that she had not seen the other clinical reports on appellant. (15 RT 2823-2825.)

When asked whether she "agree[d] with Dr. Wu that a decrease in the frontal lobe activity is consistent with" ADHD, Dr. Mayberg commented that the studies were inconclusive. (15 RT 2767-2770.) She considered research in this area to be very exciting, but "not ready for prime time." (15 RT 2822-2823.) With regard to Dr. Wu's testimony that research showed that an untreated person with ADHD has a much higher risk of becoming involved in criminal activity, Dr. Mayberg testified that while she might agree with the basic principle, one cannot draw conclusions from a PET scan. People with ADHD have problems with impulsivity, but "[t]hat is very different from saying that impulsivity implies impulsive -- impulsiveness toward violence." 15 RT 2770-2774.)

Dr. Mayberg labeled Dr. Wu's testimony that research indicates that persons with temporal lobe abnormalities can have an inability to regulate aggressive impulses as a "gross generalization not supported by the medical literature[.]" She testified that "if we're talking about overactive temporal lobes as being indicative of a tendency towards violence . . . that's categorically untrue" although not a "flat out falsehood." There is no data that establishes a link between temporal lobe hyperactivity and "goal-directed" violence. (15 RT 2775-2778, 2839-2841.)

Dr. Mayberg also disagreed with Dr. Wu's interpretation of appellant's

PET scan results. In her view, Dr. Wu's threshold for finding an abnormal result -- one standard deviation or greater -- was not consistent with good scientific practice, which requires two standard deviations. (15 RT 2782, 2785.) Dr. Mayberg, having thereby ignored a good portion of the abnormal areas on appellant's scan, interpreted the remaining abnormal areas as either "artifacts" or technical errors by Dr. Wu. (15 RT 2784-2788, 2791-2792, 2794-2798, 2801-2802, 2815-2816, 2818-2819.) In her view, Dr. Wu had also failed to match the appropriate "slices" in the scan. (15 RT 2798-2799, 2818-2819, 2847-2848.) She opined that the PET scan of appellant's brain showed trivial abnormalities in the frontal lobes, nothing consistent with attention deficit disorder; normal temporal lobes; and nothing consistent with anything published on head injuries. (15 RT 2784-2790, 2800-2802, 2806-2807, 2846-2847.)

Three witnesses gave victim-impact testimony. Home Base cashier Maricela Saucedo was recalled and testified that Scott Wilson had been her supervisor for two months, during which time she saw him nearly every day. [22] She described him as a hard working, friendly, outgoing, and understanding boss. She was emotional during her testimony, and felt guilty that if she had not asked Wilson for change, the killing would not have happened. The prosecutor twice told her that she was not responsible and "should not feel bad about that." (14 RT 2566-2569.)

Scott Wilson's aunt, Joyce Fyock, was understandably emotional during her testimony: she had known him his entire life, and had looked after him when he was a small child. His father died when Scott was one and a half years old. As a child, he liked the circus, movies, and birthday parties; he later

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22. Appellant impeached Saucedo with statements she made to law enforcement, to the effect that she had worked at Home Base for only several weeks before the shooting. (14 RT 2570-2573, 2582-2583.)

became interested in sports. He was outgoing and cared about people, especially for his mother and the family. (14 RT 2704-2706, 2709.)

Fyock was present at the hospital when Wilson was on life support. His mother could not attend the trial because she required oxygen for emphysema and seeing appellant would have upset her too much. Mrs. Wilson viewed her son at the mortuary, and did not like the way his hair had been shampooed. (14 RT 2706-2710.) Fyock testified that:

> Had he been in a car accident or if he had died of a dreadful disease, I think his mother could have accepted it a little more, but to think that a man would shoot him dead when he was not doing anything wrong was just almost more than she could stand. But we talked about the justice system, and she believes in justice, and she thinks justice will be carried out here in this court.

(14 RT 2710.)

Scott Wilson's brother, Kirk, testified that for most of their lives, he had been more like a father to his brother, and in the last six months of his brother's life, their relationship was particularly close. (14 RT 2711-2712, 2718-2719.) In April 1996, Scott worked at the Home Base in Vista and was promoted to customer service manager. (14 RT 2712, 2715.)

Scott loved sports and dreamed of working at ESPN. At age 28, he went back to school to study television production, and was hired as an intern for a local television station to produce sports promotions. A videotape written and produced by Scott shortly before the murder was played for the jury. (14 RT 2716; Exh. 64.) Scott was very proud of the videotape, and viewed it as the first step on the road to fulfilling his dream. (14 RT 2717.)

Wilson was with his brother for five hours at the hospital and described his appearance. His head was "swollen up like a pumpkin," and his eyes were bulging. There was a bandage on his head and blood was coming out; his head split open after hitting the cement floor. There was a large knot on the left side of his head, and staples in the skin on the right side by the

temple. Blood was also coming from his ears and nose, making the bandage increasingly red. (14 RT 2713-2715.)

Two weeks before the killing, Scott turned 30 years old, and suggested that they go to Catalina Island. Wilson became seasick on the way back and Scott took care of him. (14 RT 2715, 2717-2719.) When Wilson closed his eyes, he had two impressions of his brother. The first was in the hospital, "when I see his head and the blood pouring out of his head and his eyes, and that kind of stuff, and listening to the doctor pronounce him dead[.]" The second was after they returned home from Catalina, and his brother gave him a "thumbs-up" and said "everything's going to be okay." (14 RT 2715, 2719-2720.) He testified that "the fact that [Scott] had a goal that inspired him to be alive and then to have him murdered by a guy who had a goal to go back to prison, I feel resentful, and I feel anger and -- you know." (14 RT 2720.)

2. <u>The Defense Case</u>

Dr. Wu was recalled by appellant and took issue with Dr. Mayberg's testimony. Contrary to her testimony, many studies have shown that persons with ADHD are at risk for violent and criminal behavior, particularly when such persons are not treated properly. (15 RT 2869-2871, 2877-2881.)

With regard to Dr. Mayberg's testimony about the use of standard deviations in interpreting PET scans, Dr. Wu testified that his scans show a range from one to three standard deviations. The clinician can use whatever cutoff he or she thinks appropriate. (15 RT 2908-2909.) With regard to Dr. Mayberg's testimony concerning mismatches in the scan, Dr. Wu pointed out that he had performed such scans on 3000 subjects; Dr. Mayberg, on the other hand, had no direct experience with the UCI machine or its software. That lack of familiarity "would compromise her ability to be able to read the scan with a great degree of accuracy." (15 RT 2887-2889, 2905-2906.)

Although Dr. Mayberg testified that there was no linkage between PET

scan results and the predictability of criminal behavior, there have been PET scan studies on criminals which showed a decrease in frontal lobe metabolism. Moreover, there is probably some correlation between explosive personality disorder and decreased frontal lobe metabolism. (15 RT 2906-2908.) Dr. Wu also disagreed with Dr. Mayberg's interpretation of the results of appellant's PET scan:

> I believe that the scan is quite abnormal, that there is a significant decrease in frontal lobe abnormality, that that is consistent with published articles which show that A.D.H.D. adult males have decreased frontal lobe metabolism.

(15 RT 2889.)

With advisory counsel Freeman conducting the examination, appellant testified that his ethnicity was half Finnish and half Tarahumara Indian. His mother's maiden name was Perez; his father's was Frederickson. The only other child of this union died in childbirth. The family moved often and, before appellant was five years old, he had lived in North and South Dakota, Minnesota, Utah, Nevada, and California. His father abandoned the family when appellant was five years old. Appellant sometimes used the maternal last name Perez out of disrespect for his father. (15 RT 2916-2918.)

During his preteen and teen years, appellant lived in East Los Angeles, a Hispanic community. He had some problems adjusting to that community as he was neither fully Hispanic nor fully Anglo. This caused problems with his integration into his extended family and with his peers. (15 RT 2916-2918.)

Because of the frequent moves, appellant attended kindergarten in East Los Angeles, grades one and two in the City of Commerce, grades three and four in Santa Ana, and grades five and six in Fullerton. He never stayed at any school for very long, and was not sure whether he completed junior high. (15 RT 2921-2122.) When asked whether he had been a behavior problem in

kindergarten, appellant stated that there had always been problems. He could not sit still in class and was disruptive, mostly by refusing to take tests or to participate, and by demanding too much attention from teachers. When asked why, he stated "I don't -- I don't -- I don't have any recollect of justification for any -- anything that I --[.]" He learned later that he had attention deficit disorder. He was prescribed medications which, his mother explained, would help slow him down and enable him to concentrate. His grades were low C's, D's and F's in school; but his IQ always tested between 117 and 128. (15 RT 2923-2924.)

His mother frequently hit him on the head because he had a habit of answering "what" or "huh" when asked a question, and he wanted time to formulate and give the best answer. His ears had been operated on twice because his mother kept telling the doctors that he was deaf. He had been told that, as a child, he was unsympathetic to adults of low intelligence, calling them "stupid dogs, stupid cows." (16 RT 3053-3054.)

When appellant was still young, his mother married a Samoan man who had two children. His step-father, who was six feet, two inches, and over 250 pounds, was physically abusive to appellant, although appellant did not blame his own misbehavior on his step-father. At age nine, he went to Sunday school and learned to speak Samoan, although he has since lost that ability. (15 RT 2926-2928.)

Appellant lived with the family until the age of 12 or 13, when he was first hospitalized for mental problems. For most of his subsequent life, he was institutionalized in group homes, juvenile hall, and state institutions. (15 RT 2918-2919, 3052.)

Appellant testified that he is fluent in Spanish and that he had twice used that fluency while institutionalized to help others. In 1986, a guard at Folsom wanted a pay raise and he helped her with her studies. At Atascadero,

he interpreted for a nurse when an inmate was in distress. He learned rudimentary German at the age of 14 or 15, when he was in an Ontario foster group home. After he left the foster home, he went to libraries to read German books. (15 RT 2924-2925, 2928-2829.)

In 1980, at age 18, appellant joined the Navy, and was on active duty for five months before receiving a general discharge. (15 RT 2919.) He admitted having been AWOL twice. (16 RT 3031.)

In 1981, appellant committed the Anaheim market robbery, a robbery that took place two blocks from his house. He carried a length of pipe, not a gun, and was not wearing a stocking mask, but rather a hair net, as was the style among Chicanos in the early 1980's. He did not recall ordering the customer to go behind the counter; he told her to go inside and stay there. (15 RT 2950-2952.)

In 1982, when he was at San Quentin, appellant passed his "G.E.D." on his first attempt. (15 RT 2919-2922; Exh. M.) He also earned certificates for vocational training in drywall and small engine repair. When institutionalized, he had a motivation to learn and, with the institutional controls and guidance, was able to focus. Once he was released from prison, however, there were no controls and he became involved in criminal activity. (15 RT 2934-2936, 2938-2939.)

In 1984, at age 21, while in prison, appellant was initiated into the Mexican Mafia, one of seven prison gangs. (15 RT 2965-2966.) During that time, a member of the Cuban gang burgled the cell of a member of the Mexican gang, and refused to make reparations. One week later, the "shot-caller" for the Mexican gang gave appellant a sharpened metal roller and told him that, as a member of the gang, he must stab the victim. Appellant accepted, but was nervous because he had never stabbed anyone before. The next day, he changed his mind and informed the shot-caller of his

reservations. The shot-caller took back the weapon, but said that appellant could be involved in an altercation with the leader of the Cuban gang. Appellant agreed, but did not know that the fight would be a diversionary tactic to effect a stabbing by someone else. (15 RT 2968-2972.)

The next day, on his way back from dinner, appellant walked past the victim and asked him for a cigarette. When the victim reached into his pocket, appellant started to punch his face and upper body. There were no guards in the unit when the fight started, and over 400 inmates in the area. Several guards arrived, pushed appellant to the ground, and handcuffed him. Appellant then saw the victim down on the ground, bleeding from stab wounds. He did not stab the victim and did not see the perpetrator. At the preliminary hearing, the victim did not identify appellant as the person who had stabbed him. However, appellant pleaded guilty and served an extra six months in prison. (15 RT 2972-2978.)

He joined the Mexican Mafia thinking that he could move the gang away from criminal activities and use it to raise Hispanic consciousness in prison. In 1985, however, he resigned from the gang because it wanted to start a war with the African-American inmates. The punishment meted out by the gang for resignation is death. Thus, appellant was stabbed with a welding rod, resulting in serious wounds, and was in intensive care at a hospital for seven days. He would not identify the perpetrator because informing on members of the gang is not acceptable in that culture. Thereafter, when incarcerated, appellant has been in protective custody, which means that he is locked in his cell for 46 out of every 48 hours. (15 RT 2979-2982.)

Appellant was raised in the Catholic Church, and confessed his sins on a regular basis, especially when he was institutionalized. He had studied and read through the Bible numerous times. In jail, he confessed the Home Base crime to a Catholic priest, and was given absolution and penance. He had not

forgiven himself, however. (15 RT 2932-2933, 2948-2950.)

While incarcerated, appellant earned certificates for basic computer, basic programming, intermediate word processing, and intermediate basic programming (15 RT 2937; Exhs. P-S.) He did not consider his prison certificates to be achievements:

> I'm -- I'm -- as intelligent as I am, I'm fully capable of doing anything, you know. Given the materials and instructions I can build a space rocket or whatever. To me the use of my knowledge, my intelligence isn't something to be, you know, a pat on the back.

(16 RT 3066-3067.) At Atascadero, he earned a certificate for sign language, and worked in the dining hall with seven deaf mutes. (15 RT 2983-2986; Exh. W.)

While in prison, he befriended a Saudi Arabian who taught him certain basic phrases from the Koran. He also became interested in the philosophy of the Jehovah's Witnesses, wrote to them, and began a weekly study of the Bible. When he transferred to the prison at San Luis Obispo, he sought out Jehovah's Witnesses meetings, and met with their ministers three times a week for Bible study. In 1994, while at Atascadero, he continued those studies. (15 RT 2929-2932, 2933-2934; Exhs. T-V.) On cross-examination, he admitted that in 1986, while in prison, a handwritten list of weapons and chemical recipes to kill people was found in an address book that he had received from the Christ Truth Ministries. (16 RT 3032.)

He has always been interested in reading, and described himself as a self-motivated reader. (15 RT 2921-2122.) He acknowledged that it was incongruous to love learning, yet not be able to function in school. He pursued his reading habits when he was outside of an institution, and had an extensive library in his camper. He has wide interests, including non-fiction, classical literature, and how to books. He often reread books, both to extract more meaning and because his mind races. (15 RT 2940-2942.)

At age 24, after five years and five different prisons, appellant was released on parole and became employed. His grandfather gave him a thin metal rod, 18 inches long, to help with a stuck carburetor on an old car that appellant had purchased. After being involved in a car accident, items were thrown from the trunk into the passenger compartment. The police searched the car, found the metal rod, and charged him with possession of a "billy-club." He pleaded guilty. (15 RT 2953-2954; 16 RT 3032-3033.)

On cross-examination, appellant acknowledged that the accident resulted when he tried to avoid being pulled over by a police officer for a burned-out headlight. He fled from the car after the crash. The car struck several objects, including a concrete planter and two trees, and came to rest against a brick wall. He did not recall that a .22-caliber rifle, a box of shells, a translucent face mask, a large trench coat and gloves had been found in the car. He did not mention those circumstances on direct-examination because he was not asked about them, and "[t]hat's why we have cross-examination." He was not free to volunteer information when he was not asked for it. (16 RT 3033-3040.)

Appellant reprised his sanity phase testimony regarding the 1991 stabbing in Newport Beach. He had been released on parole for five to six months when the stabbing occurred. He did not stab the victim, but pleaded guilty because his friend had never done time and asked him to "take the beef" in exchange for 50 dollars a month on his books, food, and a television. He accepted the maximum punishment because he did not want to "quibble." (15 RT 2955-2964; 16 RT 3045-3046, 3062-3065.)

On cross-examination, appellant stated that he had "no reason to doubt" that he had made untruthful statements to the officers who investigated the Newport Beach stabbing. (16 RT 3041.) When he arrived at state prison, appellant gave his version of the stabbing in a document that the

prosecutor read to the jury:

> I stabbed a guy because he was beating up my neighbor. He was beating up my neighbor because we went to his house to collect money, and he didn't want to pay. He did not want to pay because he did not have sex with my neighbor's sister because they were injecting cocaine. I did not know all this before. . . . I only was told that someone had taken his sister, and we were going to go get her back, and I went along to watch and to pass time. [¶ . . . ¶]
>
> I have stabbed a lot of people before. It's like hitting them but better. I don't feel sorry for anyone I stabbed because they create the situation. I only react as it comes naturally.

(16 RT 3043-3044; Exh. 67.)

Appellant enjoyed helping his fellow inmates, and felt successful as a Ward Senator at Atascadero. He was trying make the ward better and the patients more autonomous. The psychiatric technicians were not well educated; some were bullies and would demean the patients. While at Atascadero, he asked for full restraints several times. Although he knew that he was a danger when not institutionalized, appellant wanted to be released from Atascadero. (15 RT 2942-2945.)

In the late 1980's, as part of a college course, appellant made a videotape commercial for a lunch-cooler product. That brief video was played for the jury. A second videotape, where appellant described his mental problems and said "goodbye" to his family, was also played for the jury. After making that video, appellant tried to commit suicide, but failed. (15 RT 2986-2990; Exh. Z.)

After his release from Atascadero in August 1995 and until the Home Base crime, his mental state was tumultuous. The violent thoughts that had plagued him his entire life continued. During the trial, he was medicated: Ativan for anxiety and Propranolol for migraines. Ativan does not still the thoughts, but helps with the anxiety that results from inner stress. (15 RT

2939-2940, 2946-2947, 2984-2985.)

On cross-examination, appellant acknowledged making the following statements to Dr. Flores:

> I wanted to go back into prison. I've been locked up all my life. The only times I've used drugs or had suicidal ideation is on the outs.
>
> I like it inside. I'm more comfortable. [¶] On the outside I'm a totally different person. In here I'm rather proud of my intelligence and my looks. I'm very creative. I'm respected. I'm a leader of men. On the streets I feel like a juvenile out there.

(16 RT 3049.) He continued to maintain that he did not go into Home Base to commit a robbery, and that, except for "impressions," he did not have a good recollection of what had occurred. (16 RT 3050.)

The prosecutor read from a questionnaire that appellant's mother had filled out when appellant was 19, wherein she stated that appellant had a habit of lying to protect himself, began stealing at age 10, and had taken money, tools, and jewelry at home. At age 18, he twice stole his mother's car. (16 RT 3050-3051.) Under "further comments," appellant's mother wrote:

> I understand Dan might have a chance to go to C.Y.A. instead of state prison. I'd just like to say that I'm hoping naturally for the best possible place for him to get rehabilitated, learn some sort of profession. I figured C.Y.A. might be one last chance before going to state prison. Family does love him, wants more than anything else to see him turn into a man that has some purpose in life and is willing to join his family. Dan has a real neat five-year-old brother that he's missing.

(16 RT 3047-3049.)

According to appellant, his mother said those things to make herself "look good." By 1982, she had already filled out numerous such questionnaires. (16 RT 3054.) He asked his mother several times to testify at the trial, but she refused, stating that her in-laws were not aware of the "circumstances" of the crime and she did not want to give the case more

publicity. Appellant believed that she was afraid to answer questions under oath. His father was incarcerated in Montana, "facing twenty years," and could not attend the trial. (16 RT 3054-3056.)

Asked by Freeman what sentence he would recommend to the jury, death or LWOPP, appellant stated that he would recommend death. That was his personal wish at the time, and had been his view since his arrest. He could "handle life very, very well in prison," but viewed death as "[a] fitting end to a ruined life." (16 RT 3065-3066.)

On cross-examination, the prosecutor reminded appellant that, in his guilt phase closing argument, he told the jury that he did not want to receive the death penalty. The prosecutor also averred that appellant had urged the District Attorney's "Special Circumstances Committee" not to seek death. Appellant replied that he remembered telling that Committee that the special circumstance was "untrue" and therefore the prosecutor's office "would be remiss" in seeking death. He acknowledged feeling comfortable in prison, and had so testified many times. His family wanted him to defend his life as best he could. (16 RT 3070-3072.)

On redirect-examination, appellant testified that if sentenced to LWOPP:

> I would continue doing that which I've been doing my entire life. I would continue seeking to determine the bounds of my intelligence, to find anything that I'm incapable of contemplating or thinking about or philosophizing about, and if there is, then I will -- I will try to cure that deficiency by self-educating myself. I'll always attempt to better my environment wherever that is.
>
> I know that other prisoners that lack intelligence or skills that I do look up to me. I take that responsibility very seriously. I do not generally lead other prisoners astray. I don't try to prey on other prisoners.
>
> I'm not looking forward to spending the next 30 or 40 years in maximum security prison in the State of California. If given that, I will make do the best way I know how. I'll survive.

> If I'm given the death penalty, I'm not going to worry overly much about that. I am worried about the effect that it will have on certain close family members, but as for myself, I will just bide my time on death row. Once again just trying to make my environment better for myself and fellow prisoners, continue my education and learning until it's time for me to leave.

(16 RT 3067-3068.) When asked whether he would try to shed the demon that had been plaguing his mind his entire life, appellant stated:

> No. I'll give up on that. I think it's painfully obvious after every attempt that I've made to get psychiatric treatment while in hospitals -- I mean while in prison, they're -- they're willing to give me the medication, but they're not willing to attempt to treat me in any way, shape or form.

(16 RT 3068-3069.)

Appellant also apologized for the crime. He never tried to deny his responsibility and thought it was a "joke" for the Public Defender to plead him not guilty. He attempted to plead guilty and acknowledge full responsibility even though he did not believe that the special circumstance was true. He made no attempt to contact the victim's family because he thought that would be improper. He received a letter from the family, which he read often, and understood because "if anybody ever murdered my brother or anybody else, I would kill 'em. I would kill 'em with my bare hands." (16 RT 3069.)

Wayne Dapser reprised his guilt phase testimony that, in February 1996, he had been matched with appellant in the VIP program. Over the next four months, Dapser saw and spoke with appellant many times, and observed him in different settings. They talked at length about appellant's past, prison, family, and difficulties. Dapser's initial concerns about appellant dissipated after they met and talked. Appellant did not misuse his trust, treated his grandparents with respect, followed up on job interviews, and was polite with people. (16 RT 3015-3021.)

Appellant was one of the most intelligent men that Dapser had known. Appellant came from a difficult background and had a "childhood from hell," but there were surprising facets to his personality, including his intelligence, his interest in politics and literature, and his rapport with and desire to help other people, including the homeless. Dapser was impressed at how hard appellant tried to reenter the system: he had written a resume, went on job interviews every week, and refused numerous opportunities to make money by engaging in criminal activities. At the same time, appellant was frustrated because, outside of an institution, he could not take care of himself. Appellant was usually optimistic, but at times would become depressed and, at one time, suicidal. (16 RT 3019-3024.)

Dapser was a Republican and generally supported the death penalty, but he did not believe that death was appropriate in this case. First, killing appellant would not bring back the victim. Second, from what he knew of the crime and appellant, he did not believe that appellant intended to kill the victim. Third, LWOPP was a severe punishment. He had heard stories of life in prison, and knew that it was not a country club; appellant had almost died in there once. Appellant would spend the rest of his life in prison, where he could reach out and give guidance to others. (16 RT 3021, 3025-3026, 3028.)

On cross-examination, the prosecutor asked Dapser whether appellant told him that he went to the Home Base to rob the store. Appellant's objection based on the attorney-client privilege was overruled, but Dapser refused to answer because he was the attorney of record when appellant was arrested and was bound by the privilege. The prosecutor's motion to strike Dapser's entire testimony was denied. Dapser's belief that appellant had not intended to kill the victim was based on his knowledge of and spent time with appellant. (16 RT 3027-3028.)

On redirect-examination, Dapser stated that he did not know the

victim, but had lost people who had been close to him under similar circumstances, and could appreciate the family's pain. But he had learned to know appellant as a human, and would feel a strong loss if appellant were sentenced to death. (16 RT 3028-3029.) On recross-examination, Dapser acknowledged that he had never spoken to the victim's brother, who was present at the trial. (16 RT 3029-3030.)

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ARGUMENT

1. APPELLANT WAS DENIED HIS PERSONAL AND FUNDAMENTAL RIGHT TO CONTROL HIS DEFENSE BY PURSUING A COURSE OF ACCEPTING RESPONSIBILITY, PLEADING GUILTY, AND FOCUSING ON A CASE FOR LIFE AT THE PENALTY PHASE

A. Introduction

This Court has long adhered to the view that certain decisions in a capital case are so personal and fundamental to the accused that they must be respected, even if counsel does not agree, and even if those decisions impact the state's interests in a reliable death judgment. The decision to plead guilty and seek a life sentence at the penalty phase must be counted as one of those decisions, as it is personal to the defendant, and integral to his right to control his defense and his fate. Yet, that decision is subject by statute to defense counsel's assent: under section 1018, a defendant's guilty plea in a capital case cannot be accepted unless counsel is present and consents to the plea.

In *People v. Chadd* (1981) 28 Cal.3d 739, this Court upheld the consent-of-counsel requirement where the defendant sought to plead guilty to further a desire to commit suicide, concluding that "the danger of erroneously imposing a death sentence outweigh[ed]" the defendant's right to control his defense. (*Id.* at p. 751.) Justice Richardson, joined by Justice Clark, concurring in part and dissenting in part, did not agree that the defendant sought to commit suicide, and did not agree with the majority's balancing of the interests involved. In Justice Richardson's view, the decision to acknowledge guilt is both personal and fundamental to the accused, and "is his alone to make[.]" (*Id.* at p. 760 (conc. & dis. opn. of Richardson, J.).)

Justice Richardson's analysis and conclusion were correct: the consent-of-counsel requirement cannot be squared with a defendant's personal and fundamental right to control his fate and his defense by pleading guilty,

unobstructed by counsel's advice to the contrary. Thus, section 1018 is unconstitutional on its face.

Even if the statute is not unconstitutional on its face, it could not constitutionally be applied to appellant's case. Recently, in *People v. Alfaro* (2007) 41 Cal.4th 1277, this Court indicated that a decision to plead guilty "as part of a strategy to obtain a life sentence at the penalty phase" might implicate a constitutionally-protected fundamental interest sufficient to override the consent-of-counsel requirement in section 1018. Appellant's case squarely presents that issue. After his arrest, appellant confessed responsibility for the shooting. For more than three months, he was represented by counsel before entering a plea. On the day scheduled for entry of his plea, he moved to substitute counsel and informed the municipal court in chambers that he intended to plead guilty and focus on the penalty phase. He also advised the court that his decision was causing a conflict with counsel, who, according to appellant, wanted more time to investigate. But appellant made clear that he did not want to proceed without counsel because, as he told the court, that would be "tantamount to just executing me." The court denied his motion to substitute counsel without addressing the guilty plea or the conflict. Moments later, in open court, counsel entered a not guilty plea over appellant's objection.

Appellant sought to save his life, not to kill himself. He was clearly competent to make his own plea decision. He received counsel's advice regarding the plea, but simply disagreed. His decision to plead guilty and pursue a case for life at penalty was consistent with the purposes behind the consent-of-counsel requirement, and with appellant's fundamental constitutional rights. Therefore, the lower court should have accepted appellant's plea, not counsel's.

The effect of the failure to accept appellant's plea redounded

throughout this case. One week after counsel entered a not guilty plea in the face of his client's stated intent to plead guilty, appellant moved to discharge counsel and represent himself at trial. The court permitted him to do so, but did not inform him that he still would not be able to plead guilty without the consent of counsel. At two subsequent proceedings, appellant tried to plead guilty, but was not allowed to do so. Thus, this case presents another issue noted by this Court in *Alfaro*: whether the consent-of counsel-requirement in section 1018 would preclude a defendant from pleading guilty after exercising the right to self-representation. In the circumstances of this case, precluding appellant from following that course violated, among other rights, his right to self-representation.

At the penalty phase, the effect of the failure to accept appellant's plea was both to deny appellant his constitutional right to counsel and to undermine any possibility of establishing a credible case in mitigation based on acceptance of responsibility at the very outset of the case. Had his guilty plea been accepted, he would have been represented by counsel, counsel would have participated fully at the penalty phase, and appellant would have been able to present that compelling case to the jurors charged with deciding his fate. The courts' refusal to accept appellant's guilty plea violated his right to an individualized and reliable sentencing.

B. Procedural and Factual Background

The night of his arrest, appellant confessed to the shooting. (4 CT 1198-1241; Exh. 19 [transcript of June 14 interrogation].) The following day, he admitted his involvement to a reporter. (8 RT 1450-1463 [testimony of Marla Fisher].) On June 17, 1996, he was charged with first degree murder with a special circumstance, thus making him eligible for the death penalty. (1 CT 64-65; § 190.3.) At the first court proceeding, the Orange County Public Defender was appointed to represent appellant. (Municipal Court RT 4-5.)

No plea was entered on this date.

One month later, on July 16, 1996, appellant filed a short, handwritten motion seeking to proceed in propria persona. (987.9 July 17 Supp. CT 1.) Three weeks later, he confessed again. (4 CT 1242-1283; Exh. 23 [transcript of August 12 interrogation].) On August 22, 1996, at a brief hearing before Municipal Court Judge James Brooks, appellant informed the court that he could not trust counsel. (Municipal Court RT 10) The court did not inquire into the basis for his distrust and deferred decision on the motion. (Municipal Court RT 10-15.)

On October 30, 1996, the date scheduled for entry of a plea, appellant reserved his right to self-representation and requested a hearing to determine whether substitute counsel should be appointed. (Municipal Court RT 19-20.) In chambers with the two deputy public defenders assigned to represent him, appellant stated that, while he understood that defense counsel were obligated in a capital case to present "the best defense," even over the client's objection, he wanted counsel to "let me -- allow me to steer them away from certain witnesses that I don't want called onto the stand because of -- you know, I just -- I just don't want certain information coming out." (Municipal Court RT 22-23.)

Judge Brooks confirmed that appellant was speaking of the penalty phase, and opined that complaints about counsel's preparation for that phase were premature given that the preliminary hearing had not yet occurred ("you're talking about way down the line at trial and then sentencing rights"). (Municipal Court RT 23.) Appellant replied that he did not "want it way down" the line:

> I don't want it way down. I want to waive prelim. I want to go -- I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase. [¶] They want time to investigate and to check all avenues and all that, and I don't want them to do that, right?

(Municipal Court RT 23.) But he also made clear that he did not wish to proceed without counsel:

> I'm also afraid of losing all of my protections and rights by going pro per and allow . . . the prosecutor, to just walk all over me, you know, that's tantamount to just executing me. So I'm going to keep -- I'm going to keep these counsel.

(Municipal Court RT 23-24.)

Judge Brooks asked no questions regarding appellant's intent to plead guilty and waive the preliminary hearing. He simply characterized appellant's complaints as a "personality thing" and denied the motion. (Municipal Court RT 24-25.) When appellant tried to explain that the conflict was not over personalities, the court cut him off and again denied the motion. (Municipal Court RT 25.) The court did not question either appointed counsel before denying the motion. (Municipal Court RT 26.) [23]

The plea proceeding followed immediately thereafter. In open court, Judge Brooks apparently addressed his inquiry to counsel: "Mr. Frederickson is in custody represented by Ms. Barnum and Mr. Goss from the P.D.'s Office. The matter is here for arraignment. [¶] Can we move ahead to that, folks?" Deputy Public Defender Goss then entered a not guilty plea: "At this time we would acknowledge receipt of a copy of the complaint, I would waive reading and advisement, enter a plea of not guilty." (Municipal Court RT 28.) Appellant immediately responded, "Over my objection." Counsel replied, "What he means is he would like to have the complaint read." The court

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23. After the court denied the motion for the second time, Deputy Public Defender Robert Goss offered that "one of the reasons" for appellant's concerns may have been the necessity to begin a penalty phase investigation early given that the prosecution would make a decision whether to seek death 30 days after the preliminary hearing. Goss did not explain what he meant by that statement and the court did not inquire further into the statement. (Municipal Court RT 26.)

accepted counsel's plea, and made no mention of the fact that counsel had entered a not guilty plea in the face of his client's stated intent to plead guilty. (Municipal Court RT 28.)

One week later, appellant appeared before Judge Brooks and moved to discharge counsel. (Municipal Court RT 31-32.) The court asked no further questions relating to the plea or the conflict, but merely observed:

> [Y]ou strike me as a very bright person, mentally alert. You differ with your approach toward the case from your attorney's from what little I heard from you folks last time. [¶] I didn't get into that but other than to detect that you folks had a difference of opinion as to where the case was going, how to get there. But that's the only thing I noted that was inconsistent with what a law school, trained attorney would think.

(Municipal Court RT 34.)

Deputy Public Defender Goss declined the court's invitation for "input." When the court indicated that it would probably appoint the Public Defender as advisory counsel and asked whether he had "any problem" with that, Goss replied "Yes," thereby refusing to accept the appointment. (Municipal Court RT 31-32.) The court granted appellant's motion for self-representation. (Municipal Court RT 34-35.)

At two subsequent proceedings, appellant asked the lower courts to accept his guilty plea and reappoint the Public Defender. Neither request was granted. At the second such proceeding, the prosecutor informed appellant, both off the record and in open court, that "by law he cannot plead guilty to a special circumstances allegation case." (See § D, *post.*) On February 24, 1997, in superior court, appellant entered pleas of not guilty and added a plea of not guilty by reason of insanity. (1 RT 4-5.)

C. Appellant Was Denied His Fundamental Right to Control His Defense by Pleading Guilty and Pursuing a Case for Life at the Penalty Phase

1. Section 1018 Is Unconstitutional on Its Face

Under the Sixth Amendment, "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." (*Faretta v. California* (1975) 422 U.S. 806, 819-820.) Because it is the accused's fate that hangs in the balance, "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." (*Florida v. Nixon* (2004) 543 U.S. 175, 187, citing *Jones v. Barnes* (1983) 463 U.S. 745, 751.) Similarly, this Court has long adhered to the view that certain decisions in a capital case are so personal and fundamental to the accused that they must be respected, even if counsel does not agree, and even if those decisions impact the state's interests in a reliable death judgment. (See *People v. Clark* (1990) 50 Cal.3d 583, 617-618; *People v. Bloom* (1989) 48 Cal.3d 1194, 1221-1222.)

In a capital case, the decision as to how to plead -- which by statute the accused is required to make (§§ 1017, 1018) -- must be counted as both personal and fundamental to the accused. It is personal because it is his life at stake. (See *Faretta v. California*, *supra*, 422 U.S. at pp. 819-820; *People v. Chadd*, *supra*, 28 Cal.3d at p. 747; *id.* at p. 761 (conc. & dis. opn. of Richardson, J.).) It is "fundamental" because it lies at the heart of a defendant's right to control his defense. (See *Jones v. Barnes*, *supra*, 463 U.S. at p. 751; *In re Williams* (1969) 1 Cal.3d 168, 177, fn. 8; *In re Beaty* (1966) 64 Cal.2d 760, 765; 1 ABA Standards For Criminal Justice (3d ed. 1993) std. 4-5.2 (i).) Moreover, the entry of a plea in a capital case has effects beyond a finding of guilt. By pleading guilty, a defendant is able to demonstrate acceptance of responsibility, a significant mitigating factor; conversely, a not guilty plea in the face of overwhelming evidence can damage or undermine mitigating evidence by causing a loss of

credibility with the jurors at the penalty phase. (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1115; *People v. Wharton* (1991) 53 Cal.3d 522, 592; § F, *post.*) It is difficult to conceive of an interest more fundamental than obtaining a life sentence in a capital case.

For these reasons, "only the most compelling reasons can justify any interference, however slight, with an accused's prerogative to *personally* decide whether to stand trial or to waive his rights by pleading guilty." (*People v. Hill* (1974) 12 Cal.3d 731, 768, overruled on other grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896, emphasis in original.)

Although the plea decision in a capital case is personal to the defendant and integral to his fundamental right to control his defense, that decision is subject by statute in California to defense counsel's assent. Penal Code section 1018 provides in part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." [24] That provision "represents a unique exception to the traditional understanding that decisions about what plea to enter are reserved exclusively to the client . . . ." (Bonnie, *The Dignity of the Condemned* (1988) 74 Virg. L.Rev.

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24. The Legislature added the consent-of-counsel requirement to section 1018 in 1973, and intended it "to serve as a further independent safeguard against erroneous imposition of a death sentence." (*People v. Chadd*, *supra*, 28 Cal.3d at p. 750.) Under the 1973 death penalty statute, an unconditional guilty plea and admission of a special circumstance resulted in a death sentence because death was mandatory in those circumstances. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 428-429, 442, 444-445.) Under the current death penalty scheme, however, an unconditional guilty plea and admission of the truth of a special circumstance results in a separate penalty phase, at which evidence of a defendant's acceptance of responsibility and remorse are relevant. (§§ 190.1 & 190.3.)

1363, 1370, fn. 18.)

In *People v. Chadd*, *supra*, 28 Cal.3d 739, this Court upheld the consent-of-counsel requirement in section 1018 and reversed the conviction and death sentence where the defendant was allowed to plead guilty, even though he sought to do so to further a desire "to commit suicide." (*Id.* at pp. 744.) The majority recognized that "the decision as to how to plead to a criminal charge is personal to the defendant" (*id.* at p. 747), and did not disagree that the decision is fundamental. But it rejected the Attorney General's argument that the statute unconstitutionally allows counsel to "veto" his client's fundamental decision to plead guilty: that contention "fail[ed] to recognize the larger public interest at stake in pleas of guilty to capital offenses" (*ibid.*), including the interest in reducing the risk of mistaken judgments and in preventing state-assisted suicide. (*Id.* at pp. 748-750, 753.) [25]

Justice Richardson, joined by Justice Clark in dissent, did not agree that the defendant's guilty plea was "motivated by a desire to 'commit suicide.'" (*People v. Chadd*, *supra*, 28 Cal.3d at p. 762 (conc. & dis. opn. of Richardson, J.).) Nor did he agree with the majority's reasoning and conclusion regarding the constitutionality of the consent-of-counsel requirement in section 1018. He observed that the "right to defend is personal" and "necessarily encompasses

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25. This Court also upheld the consent-of-counsel requirement in *People v. Massie* (1985) 40 Cal.3d 620, where the defendant sought to plead guilty on the eve of trial, "apparently in reaction to what he viewed as the trial court's unwarranted acceptance of the truth of the testimony of several police officers regarding the circumstances surrounding defendant's confession." (*Id.* at p. 622.) The trial court accepted that plea "over his counsel's objection and advice to the contrary." (*Id.* at p. 624.) On appeal, this Court reversed and, with little discussion, reaffirmed its decision in *Chadd* that "a defendant who wants to plead guilty in a capital case must be represented by counsel who exercises his independent judgment in deciding whether to consent to the plea." (*Id.* at p. 625.)

the . . . decision whether to mount a defense at the guilt phase." (*Id.* at p. 759.) Since that right is protected from state interference under the principles announced in *Faretta*, Justice Richardson reasoned,

> then surely the comparable right to appear at the arraignment and plead guilty is likewise so protected, for in both cases the defendant makes the personal, fundamental decision, which is his alone to make, to acknowledge his guilt of a criminal offense.

(*Id.* at p. 760.) While cognizant of the state's interests in capital case guilty pleas, Justice Richardson concluded that they were not "sufficiently compelling to override defendant's constitutionally protected freedom of choice in the matter of his own plea . . . ." (*Id.* at p. 761.)

Justice Richardson also correctly recognized that the consent-of-counsel requirement is illogical in light of the other fundamental rights protected by this Court in capital cases:

> To me it makes no sense to say that a criminal defendant has a constitutional right to take the stand during his trial and freely admit his guilt but if defendant wishes to spare himself the ordeal and embarrassment of trial by pleading guilty before trial his lawyer can prevent his doing so, and this even though he cannot be compelled to accept a lawyer. The majority hold, in short, that defendant may assert his constitutional right to acknowledge his guilt, but only on the condition that he submit to the ordeal of a trial.

(*Id.* at pp. 761-762.)

Since the decision in *Chadd*, this Court has fully embraced Justice Richardson's view that a capitally accused defendant's personal and fundamental decisions must be respected. In *People v. Bloom*, *supra*, 48 Cal.3d 1194, this Court observed that:

> On numerous occasions we have recognized the need to respect the defendant's personal choice on the most fundamental decisions in a criminal case. Thus even in a capital case defense counsel has no power to prevent the defendant from testifying at trial and the defendant may testify at the penalty phase to a preference for the death penalty. By exercise of the right of self-

> representation, a capital defendant may dispense with the advice and assistance of counsel entirely, waive jury trial, and elect not to oppose the prosecution's case at the guilt phase.

(*Id.* at pp. 1221-1222, footnote, internal citations and quotations marks omitted.) Similarly, in *People v. Clark*, *supra*, 50 Cal.3d 583, this Court concluded that:

> The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty. It follows that the state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing himself at all stages of the trial.

(*Id.* at pp. 617-618, internal citations omitted; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1342-1343.)

For the reasons stated by Justice Richardson in his concurring and dissenting opinion in *Chadd*, and in light of this Court's subsequent decisions regarding an accused's fundamental rights in capital cases, the capital-case, consent-of-counsel requirement in section 1018 is unconstitutional on its face. That statute could not bar appellant's attempted guilty plea. [26]

2. Even if the Consent-of-Counsel Requirement in Section 1018 Is Constitutional on Its Face, It Could Not Be Constitutionally Applied to Appellant

Recently, in *People v. Alfaro*, *supra*, 41 Cal.4th 1277, this Court indicated that a decision to plead guilty "as part of a strategy to obtain a life sentence at the penalty phase" may implicate a constitutionally protected fundamental interest that might override the plain terms of section 1018[.]" (*Id.* at pp. 1299-1300.) In *Alfaro*, defense counsel informed the trial court shortly before

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26. The consent-of-counsel requirement was not specifically mentioned during the in camera hearing or at the plea proceeding, but the municipal court was presumably aware of its requirements: "A trial court is presumed to know the governing law[.]" (See *People v. Braxton* (2004) 34 Cal.4th 798, 814.)

trial that a conflict had arisen between counsel and his client over the latter's desire to plead guilty: his client was fearful for her own and her family's safety, and did not want counsel to present evidence of a third party's involvement in the crime, but rather wished to plead guilty to avoid presentation of such evidence. Counsel believed, however, that his client should present that evidence and should not plead guilty to the capital charges. The trial court concluded that the conflict was over "trial tactics," and refused to remove counsel from the case. (*Id.* at pp. 1294-1296.)

On appeal, Alfaro argued that she sought to plead guilty to enhance her case for life at the penalty phase, that the trial court failed to conduct an adequate inquiry into the conflict with counsel, and that counsel unreasonably withheld consent to a guilty plea. (*Id.* at pp. 1294-1295.) This Court disagreed, finding that her basic premise was flawed: she sought to plead guilty *not* as part of a strategy to obtain a life sentence, but to avoid the presentation of evidence of third-party responsibility. (*Id.* at 1298-1300.) Moreover, by foregoing the admission of that evidence, a guilty plea "would have cast doubt on potentially critical mitigating evidence." In those circumstances, this Court concluded, counsel's refusal to consent to a guilty plea was both reasonable and "well within the purview of our holding in *Chadd*." (*Id.* at p. 1301.)

In this case, unlike in *Alfaro*, appellant's decision to plead guilty did in fact arise out of his desire to accept responsibility and pursue a case for life at penalty. He informed the court: "I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase." Counsel, however, would not consent to that plea, as evidenced by the deputy public defender's entry of a not guilty plea over appellant's objection.

The requirements for acceptance of a guilty plea -- apart from counsel's consent -- were met in this case. Appellant was competent to make the

fundamental decisions in his case. His decision to plead guilty, while undeniably "profound," was "no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial." (*Godinez v. Moran* (1993) 509 U.S. 389, 398.) He was appointed counsel, consulted with counsel, received counsel's advice regarding the plea decision, and appeared with counsel at the plea proceeding. He simply disagreed with counsel's advice, as the municipal court noted:

> You differ with your approach toward the case from your attorney's from what little I heard from you folks last time. [¶] I didn't get into that but other than to detect that you folks had a difference of opinion as to where the case was going, how to get there.

(Municipal Court RT 34.)

Moreover, appellant chose a course of action that was consistent with the concerns which motivated the Legislature to enact the consent-of-counsel requirement: to reduce the risk of "the erroneous imposition of the death penalty . . . ." (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1301.) As argued above, by pleading guilty, accepting responsibility, and pursuing a case for life at penalty, appellant would have been fully able to demonstrate a number of important mitigating factors, including acceptance of responsibility, remorse, and honesty. On the other hand, the not guilty plea entered by counsel risked damaging or undermining mitigating evidence by causing a loss of credibility with the sentencing jurors. (See *Florida v. Nixon*, *supra*, 543 U.S. at pp. 191-192; *People v. Freeman* (1994) 8 Cal.4th 450, 498-500; *People v. Wrest*, *supra*, 3 Cal.4th at p. 1115.)

On the points that matter, this case is completely distinguishable from this Court's cases upholding the consent-of-counsel requirement in section 1018. Appellant did not seek to plead guilty to further a desire to commit suicide, as in *Chadd*; his decision was not made on the eve of trial and out of an emotional reaction to a judge's ruling, as in *Massie*; and he did not seek to

avoid the presentation of a defense for reasons unrelated to the merits of that defense, as in *Alfaro*. Instead, he sought to plead guilty to accept responsibility and make a case for life at penalty. Appellant sought to plead guilty *not* to kill himself, but to save his life.

The Legislature anticipated that section 1018 would be "liberally construed" to effect its "objects and to promote justice." (§ 1018.) Indeed, it has been liberally construed in other contexts, as this Court noted in *People v. Rogers* (1961) 56 Cal.2d 301, at pages 305-306. Where, as here, the blind application of the consent-of-counsel requirement results in the very mischief it was designed to protect against, its purpose is not served, its objects are not effected, and justice is not promoted. The municipal court erred in not accepting appellant's guilty plea.

3. Appellant Was Denied the Right to Enter His Own Plea in Open Court

Appellant's right to *enter* his own plea personally and in open court was also violated. Section 1018 "flatly commands that '[u]nless otherwise provided by law every plea must be put in By the defendant himself in open court.'" (*People v. Hofferber* (1977) 70 Cal.App.3d 265, 268, capitalization and brackets in original.) Section 988 provides that an arraignment consists of "*asking the defendant*" whether he pleads guilty or not guilty. (§ 988, emphasis added; see also §§ 1003, 1017.) The purpose of these requirements is to ensure that the plea entered is the defendant's "own" plea. (*In re Martinez* (1959) 52 Cal.2d 808, 815.)

In this case, the municipal court addressed its plea inquiry to counsel; and it permitted counsel to enter a plea. (Municipal Court RT 28.) The court did not address appellant personally, did not permit him to enter his own plea in open court, and stood mute in the face of the contradiction between appellant's stated intent to plead guilty, and counsel's entry of a not guilty plea.

In *People v. Weaver* (2001) 26 Cal.4th 876, 964, this Court concluded that

the "[d]efendant's verbal assent to the court's questioning, done in open court, was sufficient to satisfy section 1018's requirement that a defendant personally enter his plea." But in this case, appellant *objected* to the plea entered by counsel. [27] Appellant's state and federal constitutional right, and his statutory right, to enter his plea personally and in open court were violated. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *People v. Martinez* (1957) 154 Cal.App.2d 233, 234-235; §§ 988, 1018.)

4. The Municipal Court Erred in Failing to Accept Appellant's Guilty Plea

There is no absolute right under the federal Constitution to have a guilty plea accepted by a court in either a capital or noncapital case. (*United States v. Jackson* (1968) 390 U.S. 570, 584; *North Carolina v. Alford* (1970) 400 U.S. 25, 38, fn. 11; but see Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty* (2001) 65 Alb. L.Rev. 181 [arguing that capital defendants have a due process right to plead guilty].) [28] The states, however, "may by statute or otherwise confer" a right to have otherwise valid guilty pleas accepted. (*Alford, supra*, 400 U.S. at p. 38, fn. 11.) When a state does offer a procedural option to an accused, it must be done in a way that does not impermissibly burden constitutional rights. (See, e.g., *Rinaldi v. Yeager*

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27. Deputy Public Defender Goss informed the court that appellant's objection related to a desire "to have the complaint read." (Municipal Court RT 28.) That is plainly inaccurate. Appellant received a copy of the complaint at the first proceeding and was aware of the charges (Municipal Court RT 5); thus, there was no reason for him to object when counsel waived reading of the complaint. There was a very good reason, however, to object to the entry of a not guilty plea: counsel entered that plea in the face of appellant's unequivocal intent -- stated just moments before -- to plead guilty.

28. The high court has noted that the federal Constitution neither compels an accused to stand trial (*Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 276), nor prevents him from acknowledging guilt (*Carter v. Illinois* (1946) 329 U.S. 173, 174).

(1966) 384 U.S. 305, 310; *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, 24, fn. 11; *North Carolina v. Pearce* (1969) 395 U.S. 711, 724-725.)

California law confers this right in both noncapital and capital cases. "[I]t is error to reject a competent defendant's offer of an unconditional plea of guilty in a noncapital case . . . ." (*People v. Reza* (1984) 152 Cal.App.3d 647, 654; see also *Molinar v. Newland* (N.D. Cal. 2001) 151 F.Supp.2d 1120, 1124.) Similarly, a lower court errs if it refuses to accept a valid guilty plea in a capital case. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1245-1246; *People v. Michaels*, *supra*, 28 Cal.4th at pp. 512-513.) Thus, under California law, a defendant has a liberty interest under the Due Process Clause of the Fourteenth Amendment (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 344-347; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970; *People v. Webster* (1991) 54 Cal.3d 411, 439) in having an otherwise valid unconditional guilty plea accepted by a lower court. He also had a life interest, under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), in having that plea accepted, particularly where the decision to plead guilty is part of a strategy to obtain a life sentence at the penalty phase.

Here, as argued above, appellant met each of the valid requirements for acceptance of a guilty plea in a capital case. The municipal court erred in not accepting his plea.

5. The Error Requires Reversal of the Entire Judgment

The failure to accept appellant's guilty plea affected the entire case, both pretrial and at trial. Had the error not occurred, appellant would have been represented by counsel, the guilt and sanity phases would not have occurred, counsel would have participated fully at the penalty phase, and appellant would have been able to present a compelling case in mitigation based on a credible acceptance of responsibility and remorse by having

pleaded guilty at the outset of the case. This was not "trial error" as that term has been defined: "error which occurred during the presentation of the case to the jury . . . ." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308.) Instead, the failure to accept his guilty plea affected "the entire trial process." (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 630.) Accordingly, the entire judgment must be reversed.

Even if not viewed as structural error, however, reversal of the entire judgment is still required under principles that govern the analogous situation of relief from an invalid or infirm guilty plea. In such cases, the appellate court should "'return the proceedings to the point at which the court erred and reroute them to the proper track.'" (*People v. Bryant* (1992) 10 Cal.App.4th 1584, 1598, quoting *Mourmouris v. Superior Court* (1981) 115 Cal.App.3d 956, 962; see also *People v. Kirkpatrick* (1972) 7 Cal.3d 480, 487 ["the ends of justice require that the status quo ante be restored"]; *People v. Olea* (1997) 59 Cal.App.4th 1289, 1299.) Application of that principle to the circumstances in this case means that the entire judgment should be reversed, and appellant allowed to enter his own plea at an arraignment on an accusatory pleading.

D. Appellant Was Entitled to Plead Guilty After Exercising His Right to Self-representation

If this Court decides that appellant's guilty plea could not be accepted without counsel's consent, then this case presents another issue noted but not decided in *Alfaro*: whether a capital defendant may discharge his or her attorney, represent himself or herself, and have a guilty plea accepted as part of a strategy to obtain a life sentence at the penalty phase. (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1299, fn. 4.)

Appellant sought, and was granted, self-representation one week after the in camera and plea proceedings. (Municipal Court RT 34-35.) At two subsequent proceedings, he attempted to plead guilty. On January 23, 1997, during an in camera proceeding before Judge Millard regarding section 987.9

matters, appellant attempted to enter a guilty plea and requested the reappointment of counsel:

> I would like to ask the Court to go public and allow me to enter a change of plea. After I enter a change of plea and make my plea, I would like to request a waiver of -- well, by pleading guilty, I will be waiving my preliminary examination. I'd like the Court to take my waiver of rights and schedule me on calendar for Department 5 Superior Court arraignment for schedule for trial for the penalty phase for February 5th and appoint the Public Defender's Office. I've already talked to [Deputy Public Defender] Bob Goss . . . . [Deputy Public Defender] Debra [*sic*] Barnum is willing to take the case on as soon as I plead guilty to the criminal aspect and set for Superior Court arraignment to set for trial for the penalty phase.

(Jan. 23, 1997 RT 21-22; see also Jan. 23, 1997 RT 35-36.) He continued:

> I would like to enter a plea. [¶. . .¶] I do not care -- I do not care to allow the State of California, the government, to run over me. I want to just go ahead, plead guilty, go and put my life in front of a jury and let the jury decide whether or not I should get this death penalty or whether I should get life imprisonment. But as to the matter of death, I don't even want to play these games anymore. I want to just go ahead, I want to enter a plea of guilty. I have a right to do so, and I wish to do so at this time.
>
> I've spoken with counsel. And like I said, I would drop my pro per status and accept the Public Defender's Office to represent me as far as the penalty phase is concerned. And if the Court would take my waiver, I'm making a knowing and knowledgement [*sic*] -- intelligent waiver.

(Jan. 23, 1997 RT 23-24.) The lower court granted neither request. (Jan. 23, 1997 RT 21-24, 34-35, 41; Municipal Court RT 126-136, 159-162.)

On January 27, 1997, appellant again attempted to plead guilty, this time before Judge Crandall:

> The guilt of my crime has been weighing heavily on me with a remorseful heart. I would like to offer a change of plea and enter a plea of guilty to murder in the first degree and admit the special circumstances [*sic*] and waive all appellate rights at this time.

(Municipal Court RT 159.) The prosecutor then suggested that he speak to appellant off the record. After doing so, in open court he stated:

> What I did, your Honor, for the record I had a brief conversation with Mr. Frederickson in the presence of Mr. Freeman and I had suggested to Mr. Frederickson that he seriously reconsider his thoughts about what he was planning on doing.
>
> *He wants to plead guilty to the charges. I told him by law he cannot plead guilty to a special circumstances allegation case.* He understands that, but I told him no judge can accept your plea.
>
> Furthermore, I told him that it was my opinion Mr. Freeman would offer him the best possible representation and suggested that he follow Mr. Freeman's advice on the matter.
>
> It's my understanding Mr. Frederickson despite Mr. Freeman's conversations with him and my own conversations with him in Mr. Freeman's presence *Mr. Frederickson still wants to plead guilty*, although I think he realizes that he cannot.
>
> I think it's *his desire to actually waive the preliminary hearing* which is still scheduled for February 5th. My last suggestion to him was not to do anything today. That we just come on February 5th and have more of a chance to think about it, to talk to Mr. Freeman, or talk to his investigator and then he can decide what he wants to do on the 5th.

(Municipal Court RT 160-161, emphasis added.)

The court agreed that the prosecution had a right to a preliminary hearing, and told appellant to return on the date scheduled for the preliminary hearing, thereby giving him time "to think about this and decide whether or not you truly want to waive preliminary hearing or not." The court did not address appellant's request to withdraw the not guilty plea and enter a plea of guilty. (Municipal Court RT 161-162.)

It is clear from these two proceedings that appellant attempted to plead guilty after being permitted to exercise his right to self-representation. He was constitutionally entitled to do both.

First, the mandatory *presence*-of-counsel requirement under section 1018

is clearly unconstitutional. That requirement is similar to a number of statutes which mandate that a capitally-accused defendant "shall be represented in court by counsel at all stages of the preliminary and trial proceedings." (§§ 686, 686.1, 859, 987, subd. (b).) Notwithstanding those explicit legislative enactments, however, an accused has a fundamental constitutional right to self-representation (*Faretta v. California*, *supra*, 422 U.S. at pp. 835-836), even in capital cases (*People v. Clark*, *supra*, 50 Cal.3d at pp. 617-618). Accordingly, as this Court and others have held, the mandatory presence-of-counsel statutes, including section 1018, violate the right to self-representation. (See *Clark*, at pp. 617-618 & fn. 26; *People v. Ingels* (1989) 216 Cal.App.3d 1303, 1307-1308; *Thomas v. Superior Court* (1976) 54 Cal.App.3d 1054, 1056-1059; see also *People v. Dent* (2003) 30 Cal.4th 213, 224 (conc. opn. of Chin, J.).)

Although the presence-of-counsel requirement in section 1018 is unconstitutional, the statute makes no provision for the case where, as here, the accused seeks to plead guilty after exercising his right to self-representation. In effect, the statute provides that a defendant who is represented by counsel has the right to have his guilty plea accepted in a capital case; but a self-represented defendant does not. (See *People v. Massie*, *supra*, 40 Cal.3d at p. 625; see also Cal. Judges Benchguides 98, Death Penalty Benchguide: Pretrial and Guilt Phase (CJER 2007 rev.) § 98.4, p. 98-7 ["A pro per defendant cannot plead guilty; a represented defendant can"].) Thus, the statute literally withholds from self-represented defendants a right or procedural option that is granted to represented defendants. In other words, a defendant who seeks to exercise his fundamental right to self-representation cannot do so if he decides to plead guilty.

It is no answer to say that *Faretta* spoke of a trial right, or that it "does not purport to guarantee a defendant acting in propria persona the right to do any and all things his attorney could have done[.]" (*People v. Chadd*, *supra*, 28

Cal.3d at p. 750.) *Faretta* speaks of the right of a defendant to control his defense: to require the accused to have counsel strips the right to make a defense "of the personal character upon which the [Sixth] Amendment insists." (*Faretta v. California*, *supra*, 422 U.S. at pp. 820-821.) The right of an accused to control his defense begins with the filing of an accusatory pleading. No court has held, as far as appellant is aware, that the right of self-representation does not attach until the commencement of trial.

Appellant not only had a fundamental right to self-representation, he also had a fundamental right to plead guilty in a capital case as part of a strategy for a life sentence at penalty. In light of those rights, he should have been permitted to plead guilty after counsel was discharged, notwithstanding the consent-of-counsel requirement in section 1018. To the extent that section 1018's consent-of-counsel requirement is construed to preclude acceptance of appellant's guilty plea in these circumstances, that requirement violated his right to self-representation. (See *Faretta v. California*, *supra*, 422 U.S. at p. 807; see also Bonnie, *supra*, 74 Virg. L.Rev. at p. 1370, fn. 18 [opining that section 1018 is "arguably incompatible with *Faretta*"].)

It also violated appellant's right to equal protection and to substantive due process, under the federal and state constitutions. The Due Process Clause of the Fourteenth Amendment contains a substantive component that protects fundamental rights from infringement by the states no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. (See *Reno v. Flores* (1993) 507 U.S. 292, 301-302; *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 846-850.) The Equal Protection Clause of the Fourteenth Amendment essentially requires that "all persons similarly situated should be treated alike." (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439.) Insofar as the analysis of substantive due process claims is substantially similar to the analysis applied

to equal protection claims (see *Zablocki v. Redhail* (1978) 434 U.S. 374, 395 (conc. opn. of Stewart, J.); *People v. Jenkins* (2000) 22 Cal.4th 900, 1053), the following analysis applies to both claims.

"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530, emphasis in original; see also *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at p. 439.) [29] Section 1018 adopts such a classification by distinguishing between capitally accused defendants who are represented by counsel, and those who intend to (or do in fact) exercise their right to self-representation: the former have a right, with the consent of counsel, to have a guilty plea accepted; the latter do not.

The consent-of-counsel requirement also distinguishes between defendants who can afford to retain counsel, and those who cannot: the former are permitted to discharge an attorney who refuses to abide by his or her intent to plead guilty, and substitute counsel willing to consent to an otherwise valid guilty plea (see *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144-148); the latter group, of which appellant is a member, is not permitted to do so because "the state Constitution does not give an indigent defendant the right to select a court-appointed attorney" (*People v. Jones* (2004) 33 Cal.4th 234, 244). Thus, a defendant's ability to plead guilty and thereby enhance the penalty case for life is related to his financial ability to retain counsel, a distinction which implicates equal protection (and substantive due process) guarantees. (See *In re Barnett* (2003) 31 Cal.4th 466, 472-473.)

Statutory distinctions that "touch upon fundamental interests" are

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29. This Court has held that the federal and state guarantees of equal protection are substantially equivalent and are analyzed in a similar fashion. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-572.)

subject to strict scrutiny. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.) The consent-of-counsel requirement touches upon the fundamental right of an accused to self-representation, as well as his right to control his defense, to plead guilty as part of a strategy to obtain a life sentence in a capital case, and to the right to counsel. It also touches upon his fundamental interest in life and liberty. (See *Ohio Adult Parole Auth. v. Woodard*, *supra*, 523 U.S. at pp. 288-289 (conc. opn. of O'Connor, J.); *People v. Olivas* (1976) 7 Cal.3d 236, 251.)

Strict scrutiny is a "very severe standard" under which the "law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the government's goal by the least restrictive means possible." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913, citing *Plyler v. Doe* (1982) 457 U.S. 202, 217.) The classifications involved here, including precluding a defendant from pleading guilty where he exercises his right of self-representation, cannot survive that standard.

In *Chadd* and *Alfaro*, this Court identified the state's interests that justify the consent-of-counsel requirement. (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 748-750, 753; *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300.) Several of those interests -- ensuring the accuracy and fairness of its criminal proceedings, and ensuring that a defendant's decision as to how to plead is a fully informed and competent one taken only after consideration with and advice by counsel -- are present in all criminal cases where a defendant seeks to plead guilty, and are protected independently of the capital case consent-of-counsel requirement: a guilty plea must be knowing, intelligent, and voluntary (*Boykin v. Alabama* (1969) 395 U.S. 238, 240-244; *People v. Collins* (2001) 26 Cal.4th 297, 307-308); counsel has a duty to investigate, confer and advise with his client regarding what plea to enter (*In re Williams*, *supra*, 1 Cal.3d at p. 175); the

defendant must be competent (*Godinez v. Moran*, *supra*, 509 U.S. at p. 396); and he must be notified of his right to counsel (§§ 686, 686.1, 859, 987, subd. (b)). Thus, insofar as those interests are otherwise protected in all cases, it cannot be said that the capital case consent-of-counsel requirement is "necessary" for their protection, or sufficient to justify the statutory disability imposed on a defendant who exercises the right to self-representation.

The unique separate state interests involved when an accused intends to plead guilty in a capital case -- reducing the risk of mistaken judgments and preventing state-assisted suicide -- are strong. (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 748-750, 753; *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1300.) But, as argued above, this Court has reaffirmed that the state's interests in capital cases are insufficient to override a defendant's right to control his defense; and that certain decisions in a capital case are so fundamental and personal to the accused, that the state's interests in a reliable death judgment must yield. (*People v. Clark*, *supra*, 50 Cal.3d at pp. 617-618.) There is no compelling reason why the state's interest should not give way where, as here, the accused seeks to plead guilty because he accepts responsibility and as part of a strategy to obtain a life sentence at the penalty phase. Justice Richardson had it right in his dissenting opinion in *Chadd*:

> In my opinion the state can assert no interest sufficiently compelling to override defendant's constitutionally protected freedom of choice in the matter of his own plea, so long as that plea is voluntarily and knowingly made, and has a sufficient factual basis . . . .

(*People v. Chadd*, *supra*, 28 Cal.3d at p. 762.)

The state's interest in filtering cases in which the defendant simply desires the state to help him commit suicide is strong, if not compelling. (*People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1299-1302; *People v. Chadd*, *supra*, 28 Cal.3d at pp. 750-753.) That interest is not implicated here because appellant sought to save his life, not end it. Moreover, the classifications drawn by

section 1018 do not bear a sufficiently close relation to promoting that interest. The statute contains no express duty on the part of a lower court to inquire into the reason why an accused seeks to plead guilty, or into counsel's reasons for refusing or granting consent thereto; and does not require that counsel's reasons for refusing consent be based on a valid reason, or on any reason. (See *People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1301-1302 [observing that "there is no express duty on the part of the trial court to ensure that counsel's consent to a guilty plea is not unreasonably withheld"].) As a result, the "fit" between the statute and its purposes is insufficiently close: the statute is under-inclusive in that it permits a court to accept a guilty plea from a defendant who seeks to commit "state-assisted suicide," so long as counsel consents to that plea; and the statute is over-inclusive in that a court may refuse to accept a guilty plea, even though, as here, the state's interests would be furthered by a guilty plea.

Further, less restrictive means are available to achieve the state's interests. To ensure that a guilty plea in a capital case is not without foundation, the state could require a factual basis for such a plea. (Cf. *People v. Fairbank*, *supra*, 16 Cal.4th at pp. 1245-1246 ["we do not believe that a rule requiring the trial court to inquire into the factual basis of an unconditioned plea is either necessary or appropriate to protect defendants in capital cases"].) The state could also simply mandate that before receiving a guilty plea, a lower court must ensure that the accused has received the advice of counsel.

Appellant had a right to self-representation and a fundamental interest in pleading guilty as part of a strategy to obtain a life sentence. In this case, those interests "override the plain terms of section 1018." (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1302.) The lower courts erred in failing to accept his guilty plea.

E. Appellant Was Denied the Right to Counsel

The importance of counsel in a capital case is an irrefutable proposition. (See *Powell v. Alabama* (1932) 287 U.S. 45, 49-52; *Reid v. Covert* (1957) 354 U.S. 1, 45-46 (conc. opn. of Frankfurter, J.).) This Court long ago recognized that the attorney-client relationship involves

> an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty.

(*Smith v. Superior Court of Los Angeles County* (1968) 68 Cal.2d 547, 561.)

This intimate consultation and planning is critical when the decision to be made is how the client should plead in a criminal case. Counsel must "'make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.'" (*In re Williams*, *supra*, 1 Cal.3d at p. 175, quoting *Von Moltke v. Gillies* (1948) 332 U.S. 708, 721; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 933.) Having done so, counsel must *defer* to the client's fundamental and personal right to make that decision. (*In re Beaty*, *supra*, 64 Cal.2d at p. 765; *Jones v. Barnes*, *supra*, 463 U.S. at p. 751; cf. *People v. Gauze* (1975) 15 Cal.3d 709, 717-718 [counsel cannot compel his client to present an insanity defense].)

The consent-of-counsel requirement in section 1018, by conditioning the client's right to plead guilty upon counsel's consent, effects a unique intrusion into this "intimate process of consultation and planning," and alters the traditional allocation of authority. In this case, that requirement resulted in a conflict between appellant and counsel over appellant's right to control his defense by pleading guilty and pursuing a case for life. That conflict remained unexplored and unresolved by the municipal court. In turn, that conflict resulted in appellant discharging counsel: one week after counsel entered a not guilty plea in the face of his client's stated intent to plead guilty,

appellant discharged counsel.

Appellant would not have discharged counsel unless the conflict was irreconcilable. He made clear at the in camera hearing that he desired and required counsel: "I'm also afraid of losing all of my protections and rights by going pro per and allow . . . the prosecutor, to just walk all over me, you know, that's tantamount to just executing me. So I'm going to keep -- I'm going to keep these counsel." (Municipal Court RT 23-24.) By intruding into the intimate and confidential attorney-client relationship, and by precluding him from pleading guilty, the consent-of-counsel requirement induced appellant to discharge counsel. It also unfairly forced him to relinquish his right to counsel in order to, in his belief, have his guilty plea accepted. Under these circumstances, appellant's putative waiver of counsel was not knowing, intelligent, and voluntary. (See *Faretta v. California*, *supra*, 422 U.S. at p. 835; *United States v. Williams* (9th Cir. 1979) 594 F.2d 1258, 1260 (per curiam); *Pazden v. Maurer* (3d Cir. 2005) 424 F.3d 303, 316-319; see also Arg. 2, *post.*)

The result was a complete denial of counsel, in violation of appellant's state and federal constitutional right to the assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *Rothgery v. Gillespie County, Tex.* (2008) __ U.S. __, 128 S.Ct. 2578, 2581-2587; *People v. Jones* (2004) 33 Cal.4th 234, 244 [right to counsel under the state Constitution].) That error is prejudicial per se and requires reversal of the entire judgment. (See, e.g., *Perry v. Leeke* (1989) 488 U.S. 272, 278-280.)

F. At the Penalty Phase, the Effect of the Consent-of-Counsel Requirement Was to Prejudicially Violate Appellant's Right to Have the Jurors Consider and Give Meaningful Effect to His Acceptance of Responsibility and Case for Life

Appellant has argued above that the entire judgment must be reversed because the complete denial of counsel affected the entire case. If this Court does not agree, then the penalty judgment must still be reversed due to the

effect at the penalty phase of the lower courts' failure to accept appellant's guilty plea.

Appellant made clear to the municipal court that he had decided to plead guilty, accept responsibility for the crime, and pursue a case for life at penalty: "I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase." (Municipal Court RT 23.) He reiterated this intent at later proceedings:

> The guilt of my crime has been weighing heavily on me with a remorseful heart. I would like to offer a change of plea and enter a plea of guilty to murder in the first degree and admit the special circumstances and waive all appellate rights at this time.

(Municipal Court RT 159.)

In determining whether death is the appropriate sentence, jurors "must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674.) Appellant's attempted unconditional guilty plea was relevant to a number of significant mitigating factors.

First, he would have been fully able "to assert his acceptance of responsibility as an argument in mitigation." (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 186; see also *People v. Wharton*, *supra*, 53 Cal.3d at p. 592 [evidence of acceptance of responsibility is mitigating].)

Second, an unconditional guilty plea was consistent with and relevant to demonstrating remorse (*Meyer v. Branker* (4th Cir. 2007) 506 F.3d 358, 369-370), a factor that is "'universally' deemed relevant to the jury's penalty determination" (*People v. Crittenden* (1994) 9 Cal.4th 83, 146; see also *Jones v. Polk* (4th Cir. 2005) 401 F.3d 257, 264).

Third, an unconditional guilty plea was relevant to demonstrating that

appellant sought to spare the victim's family (and his own family) the pain of an unnecessarily drawn-out legal process: "Because trials of capital cases can be especially traumatic, some defendants are compelled to enter guilty pleas so as to avoid the pain that the process inevitably will cause to themselves, their families, or the victim's families." (*People v. Montour* (Colo. 2007) 157 P.3d 489, 500; see also *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1113; Fisher, *supra*, 65 Alb. L.Rev. at pp. 181-182, 201-202.)

Fourth, by demonstrating acceptance of responsibility, an unconditional guilty plea was relevant to show appellant's disposition and commitment to rehabilitation, and the likelihood of a peaceful adjustment to life in prison. Acceptance of responsibility demonstrates that an offender "is ready and willing . . . to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." (*McKune v. Lile* (2002) 536 U.S. 24, 36-37.) A disposition for "a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 7.)

Fifth, an unconditional guilty plea was relevant under section 190.3, factor (k) as demonstrating appellant's "honesty and candor" (see *People v. Wrest*, *supra*, 3 Cal.4th at p. 1115), and as showing that he "had come to appreciate the gravity" of his actions (*People v. Danielson* (1992) 3 Cal.4th 691, 736 (conc. & dis. opn. of Kennard, J.), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13).

Each of these mitigating factors should have been fully considered by the jurors charged with determining whether appellant would live or die. Instead, appellant was precluded from pleading guilty and, as a result, his right to have the sentencer hear, consider, and give full and meaningful effect to that evidence was violated. (See *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. 233,

127 S.Ct. at pp. 1672-1675; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 395-399; *People v. Frye* (1998) 18 Cal.4th 894, 1015-1017; *People v. Mickey* (1991) 54 Cal.3d 612, 692-693.)

Precluding appellant from pleading guilty also damaged his credibility at the penalty phase. It hardly needs stating that an accused in a capital case has an interest in retaining some measure of credibility with those entrusted with deciding whether he lives or dies. In fact, the prosecutor in this case told the jurors that "under the (k) factor, you have to assess Mr. Frederickson's credibility." (16 RT 3146.) But a not guilty plea in the face of overwhelming evidence -- whether freely chosen by the defendant, or forced upon him, as occurred here -- can damage and undermine mitigating evidence by causing a loss of credibility with the jurors at the penalty phase. (*Florida v. Nixon*, *supra*, 543 U.S. at pp. 191-192; *People v. Freeman*, *supra*, 8 Cal.4th at pp. 498-500; *People v. Wrest*, *supra*, 3 Cal.4th at p. 1115.)

An unconditional guilty plea in this case was also relevant to respond to and weaken the prosecution's case for death, which focused greatly on appellant's acceptance of responsibility. (See *In re Steele* (2004) 32 Cal.4th 682, 698; *People v. Frye*, *supra*, 18 Cal.4th at p. 1017.) The prosecutor argued throughout the trial that "the defendant is a selfish manipulator who is quick to blame others, and quick to practice deception." (8 RT 1300.) At the penalty phase, he elicited testimony from several witnesses to the effect that appellant refused to accept responsibility for his behavior, blamed his problems on others, had an antisocial personality, which included a "lack of remorse," and was a liar and manipulator. (14 RT 2574-2575, 2604-2606, 2672.) At closing argument, he asserted that appellant "still refuses to accept responsibility for the attempted robbery," was "a liar and a person who blames others," had shown no remorse at the time of the crime, and questioned "how much genuine remorse" he had shown over the victim's

death. (16 RT 3107, 3118-3119, 3132, 3140-3141, 3143.) Appellant's entry of an unconditional guilty plea, by demonstrating, inter alia, acceptance of responsibility and remorse, would have been relevant to mitigate, if not completely undermine, the impact of the prosecutor's contrary evidence and argument. Conversely, the failure to accept appellant's guilty plea artificially increased the impact of the prosecution's case.

The errors also denied appellant the right to present his own "defense" -- in other words, his own case for life -- at the penalty phase. A hallmark of due process is the right of an accused to present his own defense at guilt. (U.S. Const., 5th, 6th & 14th Amends; Cal. Const., art. I, §§ 7, 15, 28, subd. (b); *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-327; *People v. Lucas* (1995) 12 Cal.4th 415, 456). Capital sentencing proceedings, too, must "satisfy the dictates of the Due Process Clause." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746.) Accordingly, most of the rights encompassed within the right to present a defense apply at the penalty phase of a capital trial. (See *People v. Blair* (2005) 36 Cal.4th 686, 737-738 ["Sixth Amendment rights, including the right to the assistance of counsel, apply at the penalty stage"]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 160-169; *id.* at p. 174 (conc. opn. of Ginsburg, J.); *Green v. Georgia* (1979) 442 U.S. 95, 95-97; see generally Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing* (2005) 105 Colum. L.Rev. 1967.)

Appellant's defense in this capital case was to plead guilty and accept responsibility as part of a strategy to obtain a life sentence. That strategy was both appropriate and necessary because, as argued above, acceptance of responsibility by virtue of an unconditional guilty plea is both mitigating and retains credibility with the capital sentencing jurors. On the other hand, an unfounded denial of guilt risks an "*irremediable* adverse jury reaction[.]" (*People v. Wrest, supra*, 3 Cal.4th at pp. 1115, emphasis added.) By precluding him from

entering an unconditional plea of guilty, the lower courts, under the apparent compulsion of section 1018, not only denied appellant the right to make a penalty phase defense based on a strategy of a full and credible acceptance of responsibility, but also required him to submit to a course that was unwanted, and at odds with -- and considerably weaker than -- his strategy.

Appellant was permitted to testify, at the close of the penalty phase, about his attempts to plead guilty, but that testimony did not cure the errors identified above. He testified:

> I'd like to apologize. From the day that this has happened, I have never tried to deny to anybody, and I have thought that it was a joke for anybody -- the Public Defender's Office or anybody to stand up on my behalf and answer not guilty to the charges that I'm accused of. [¶] I've attempted to plead guilty. I've attempted to acknowledge full responsibility to all of the charges, including the special circumstances, even though I don't believe in my mind that they're true.

(16 RT 3069.) [30] However, that testimony conflicted with the trial court's unambiguous statements to the jurors that appellant had entered a not guilty plea, and a statement in the jury questionnaire that appellant had entered a not guilty plea. (5 RT 843; 5 CT 1481.) Moreover, the trial court gave the jurors no explanation, despite appellant's request that it do so,[31] regarding the

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30. In his closing argument, appellant stated: "I haven't blamed anybody else for it, and I've taken responsibility for it, and you can consider that in making your determination of whether I should get the death penalty or life without the possibility of parole." (16 RT 3205.)

31. Shortly before trial began, the prosecution's motion to exclude any reference at the guilt phase to the attempted guilty plea was granted over appellant's objection. (3 RT 406-408; see also 6 RT 909-910.) At the guilt phase, when the prosecutor suggested to the jury in argument that appellant had not accepted responsibility for the killing, appellant objected that he had "attempted to accept responsibility for this crime by asking the court to accept a plea of guilty." (10 RT 2006-2010.) The trial court refused to inform the

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reasons why appellant's attempt to enter an unconditional guilty plea had failed: to wit, that the lower courts refused to accept his plea. Perhaps most importantly, testimony that appellant attempted to plead guilty and accept responsibility is materially different and does not have the same mitigating weight as evidence that he did in fact plead guilty, and thereby accepted responsibility. An unconditional guilty plea is obviously more mitigating than a plea conditioned on the receipt of a benefit: "Evidence that defendant sought to plead guilty in return for a life sentence arguably shows primarily a desire to avoid the death penalty rather than remorse." (*People v. Smith* (2003) 30 Cal.4th 581, 630, fn. 10.) By contrast, the demonstration of acceptance of responsibility that arises from an unconditional guilty plea is unequivocal.

Moreover, the *source* of a concession of guilt and acceptance of responsibility is important. Where the evidence, as here, is in the form of a statement by the defendant, jurors may view such as self-serving and insincere. (See *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *People v. Arias* (1996) 13 Cal.4th 92, 141.) By contrast, that which appellant sought to do -- plead guilty unconditionally -- speaks for itself.

Further, the *timing* of a concession of guilt, and its concomitant acceptance of responsibility, is crucial: if an acceptance of responsibility does not occur before the penalty phase, as occurred here, the jury will likely discount that and other mitigating evidence. (Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1591-1592, 1597; see also *Florida v. Nixon*, *supra*, 543 U.S. at pp. 191-192.) By contrast, "the earlier the defendant personally expresses some type of acceptance of responsibility for the killing, the greater the likelihood that the jury will be receptive to later claims of regret."

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jurors that appellant had attempted to plead guilty. (10 RT 2009-2011.)

(Sundby, *supra*, at p. 1586.)

In this case, each of those factors worked against appellant. The capital sentencing jurors were presented with testimony that he "attempted" to plead guilty, not the actual entry of that plea; that testimony came belatedly, at the very conclusion of the penalty phase; and it came from a person whose credibility would have been practically nil in the eyes of the jurors who had just convicted him of first degree murder with a special circumstance. The jurors would likely have viewed appellant's testimony regarding his attempt to plead guilty as belated, self-serving, and insincere. That testimony was an inadequate and unwarranted substitute for the defense that appellant sought to raise at penalty: timely, credible, and powerful evidence of acceptance of responsibility. [32]

The consent-of-counsel requirement in section 1018 also violated appellant's right not to be sentenced on the basis of inaccurate or misleading information. (See *Gardner v. Florida* (1977) 430 U.S. 349, 359-360 (plur. opn.); *Gregg v. Georgia* (1976) 428 U.S. 153, 190 (joint opn. of Stewart, Powell, and Stevens, JJ.).) The Penal Code requires a court, in a felony case, to "state the plea of the defendant to the jury[.]" (§ 1093, subd. (a).) Thus, the trial court here informed the jurors that appellant "has entered a plea of not guilty to the charges thereby denying that they are true." (5 RT 843; see also 5 CT 1481 [jury questionnaire].) That information was accurate when viewed against the

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32. In *People v. Alfaro*, *supra*, 41 Cal.4th 1277, this Court concluded that the exclusion of evidence of the defendant's *conditional* offer to plead guilty was harmless because it would have been cumulative to "extensive evidence of defendant's remorse" that was presented to the capital sentencing jury. (*Id.* at p. 1306.) In appellant's case, the evidence of remorse and acceptance of responsibility at the penalty phase was limited to his own brief statement; it did not include "multiple accounts" from "numerous defense witnesses." (*Ibid.*) Moreover, it bears noting that defendant Alfaro, but not appellant, was represented by counsel at both the guilty and penalty phases.

plea appellant entered in superior court. But it was misleading because the jurors were not aware of the background that led to that plea: that plea was entered only after appellant was precluded from pleading guilty early in the proceedings.

"[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 190.) A death sentence that is based in part upon inaccurate or misleading information, as here, violates the Eighth and Fourteenth Amendments. (*Ibid.*; see also *Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 161-169; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-590; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 359-360.)

Finally, these errors and the course of events that followed did nothing to enhance the reliability of the procedures leading to death. Instead, they resulted in a substantial and unacceptable risk that the death sentence was imposed in spite of factors calling for the lesser sentence, in violation of the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Deck v. Missouri* (2005) 544 U.S. 622, 632; *Lockett v. Ohio* (1978) 438 U.S. 586, 605; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.)

Reversal of the death judgment is required because "when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence-because it is forbidden from doing so by statute or a judicial interpretation of a statute-the sentencing process is *fatally flawed*." (*Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. 233, 127 S.Ct. at pp. 1674-1675, emphasis added.)

Reversal is also required under the standard of review for federal constitutional errors set forth in *Chapman v. California* (1967) 386 U.S. 18, 24,

under which reversal is required unless the state proves beyond a reasonable doubt that the error did not contribute to the death verdict. (See *People v. Smith* (2005) 35 Cal.4th 334, 367; cf. *People v. Brown* (1988) 46 Cal.3d 432, 447-448 [state law error at the penalty phase tested by the "reasonable possibility" test].) The errors distorted the sentencing jurors' consideration of acceptance of responsibility and remorse, two significant mitigating factors in a capital case. The jurors' assessment of remorse "may carry great weight and, perhaps, be determinative of whether the offender lives or dies." (*Riggins v. Nevada* (1992) 504 U.S. 127, 144 (conc. opn. of Kennedy, J.); see also Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1560-1561.) The jurors' perception that a defendant has acted responsibly and displayed remorse, prior to the sentencing hearing, has been found to be among the factors most predictive of sentences less than death in capital cases. (Sundby, *supra*, 83 Cornell L.Rev. at pp. 1586-1587.) Moreover, "by accepting responsibility for his wrongdoing, the repentant defendant actually transforms himself into a meaningfully different person, one who deserves less punishment." (Simons, *Born Again on Death Row: Retribution, Remorse, and Religion* (2004) 43 Cath. Law. 311, 331.) For these reasons, the death judgment must be reversed.

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2. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL BECAUSE HIS PUTATIVE WAIVER OF COUNSEL IN THE MUNICIPAL COURT WAS INVALID; EVEN IF THAT WAIVER WERE VALID, THE LOWER COURTS ERRED IN FAILING TO GRANT APPELLANT'S SUBSEQUENT REQUESTS TO REAPPOINT COUNSEL

If this Court does not agree that the lower courts erred in failing to accept appellant's guilty plea (see Arg. 1, *ante*), reversal of the judgment is still required for each of the following reasons: first, appellant's putative waiver of counsel in municipal court was invalid; second, the lower courts erroneously failed to grant his subsequent requests to have counsel reappointed; and third, there was no valid waiver of counsel in superior court.

A. The Municipal Court Proceedings

One month after the Orange County Public Defender was appointed to represent him, appellant filed a short, handwritten motion to proceed in propria persona. (987.9 July 17 Supp. CT 1.) At a hearing on August 22, 1996, appellant confirmed that he wanted to proceed "pro per" because "[a]t the present time I can't trust the Public Defender's Office, your Honor." (Municipal Court RT 10.) Municipal Court Judge James Brooks advised appellant that he would receive no special privileges, that he could not change his mind during trial or postpone the trial in an attempt to obtain an attorney, and that his opposition was a skilled and experienced attorney. (Municipal Court RT 10-12.) Appellant acknowledged being aware that the maximum punishment he faced was death; stated that he had represented himself three times in superior court, although never before a jury; denied that he was taking any medication; and denied having a "mental condition." [33] No written

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33. The court appears to have accepted these statements at face value. However, court records of appellant's prior convictions are present in the record on appeal, and show that appellant was represented by counsel in four

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waiver-of-counsel form was provided to appellant at this proceeding; the court deferred decision on the motion. (Municipal Court RT 13-15.)

On October, 30, 1996, at an in camera hearing regarding his motion for substitute counsel, appellant informed Judge Brooks that he intended to plead guilty and that his decision was causing a conflict with counsel:

> I don't want it way down. I want to waive prelim. I want to go -- I'm pleading guilty, sir. I mean, the only thing is, we have to go for a penalty phase. [¶] They want time to investigate and to check all avenues and all that, and I don't want them to do that, right?

(Municipal Court RT 23.) He also made clear that he did not wish to proceed without counsel:

> I'm also afraid of losing all of my protections and rights by going pro per and allow . . . the prosecutor, to just walk all over me, you know, that's tantamount to just executing me. So I'm going to keep -- I'm going to keep these counsel.

(Municipal Court RT 23-24.) The court asked no questions regarding appellant's intent to plead guilty, or the conflict with counsel, and denied the motion. (Municipal Court RT 24-25.) Immediately thereafter, at the plea proceeding, the court permitted counsel to enter a not guilty plea over appellant's objection. (Municipal Court RT 28.)

One week later, appellant appeared before Judge Brooks and moved to represent himself at trial. (Municipal Court RT 31-32.) The court asked no questions about appellant's intent to plead guilty or the conflict with counsel, and immediately provided him with a "Waiver Form" that set forth standard

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out of the five convictions (Exhs. 58-62, 67, 68); and, subsequent references in the record show that appellant was taking medication before and during trial (e.g., 1 RT 107; 2 RT 248; 12 RT 2247; 15 RT 2844, 2939). And, of course, appellant had been committed to Atascadero State Hospital as a Mentally Disordered Offender.

warnings regarding the waiver of counsel. (Municipal Court CT 51.) In open court, Judge Brooks questioned appellant regarding his awareness of the charges and the maximum penalty; and accepted appellant's statements that he had finished high school, and had represented himself before in superior court. Finally, the court asked whether "you basically want to do this because you know you have a right to do it and you want to do it?" Appellant responded, "Yes sir." (Municipal Court RT 32-34.) The court granted the motion. (Municipal Court RT 34-35.)

B. <u>There Was No Valid Waiver of Counsel in Municipal Court</u>

Under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, the parallel provisions of the state Constitution, and by statute in California, a person accused of a crime has a right to the assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Rothgery v. Gillespie County, Tex.* (2008) __ U.S. __, 128 S.Ct. 2578, 2581-2587; *People v. Jones* (2004) 33 Cal.4th 234, 244 [right to counsel under the state Constitution]; §§ 686, 686.1, 859, 987, subd. (b).) An accused also has a right under the Sixth Amendment to dispense with counsel and represent himself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 835-836.) Because the right to counsel persists unless it is affirmatively waived, the exercise of the right to self-representation necessarily requires a valid waiver of the right to counsel. (*Id.* at p. 835; *People v. Koontz* (2002) 27 Cal.4th 1041, 1069-1070.)

A waiver of the right to counsel must be voluntary, knowing, and intelligent. (*Faretta v. California*, *supra*, 422 U.S. at p. 835; *Godinez v. Moran* (1993) 509 U.S. 389, 400-401, & fn. 12.) Given the importance of the right to counsel, particularly in a capital case, courts must indulge every reasonable inference against its waiver. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1069.) On appeal, the state bears the burden of

proving the validity of a waiver of counsel. (*Faretta*, *supra*, at p. 835.)

1. Appellant's Supposed Waiver of Counsel Was Induced by the Municipal Court's Errors at the In Camera Hearing and the Plea Proceeding

Appellant informed the municipal court that he had decided to plead guilty and pursue a case for life at penalty, and that he required the assistance of counsel to save his life ("I'm also afraid of losing all of my protections and rights by going pro per and allow . . . the prosecutor, to just walk all over me, you know, that's tantamount to just executing me"). He also informed the court that his decision to plead guilty had caused a conflict with appointed counsel who, according to appellant, wanted more time to investigate the penalty phase. (Municipal Court RT 23-24.) The municipal court, however, made no inquiry into appellant's intent to plead guilty, and no inquiry into the conflict with counsel. (Municipal Court RT 24-25.) Moments later, at the plea proceeding, the court addressed its plea inquiry to counsel, then permitted counsel to enter a not guilty plea in the face of his client's stated intent to plead guilty. (Municipal Court RT 28.)

The municipal court's actions placed appellant on the horns of an unconstitutional dilemma: defend against the capital charges with counsel who would not accede to his fundamental and personal right to control his defense by pleading guilty and pursuing a case for life at penalty; or, defend without counsel and attempt to make the fundamental and personal decisions that were rightfully his to make. One week later, appellant moved to discharge counsel.

In these circumstances, there was no valid waiver of counsel at the November 7, 1996, proceeding. Where a defendant's waiver of counsel is induced by a lower court's erroneous failure to address and resolve a serious conflict between the defendant and counsel, the waiver is not valid. (See *United States v. Williams* (9th Cir. 1979) 594 F.2d 1258, 1260 (per curiam); *Pazden*

v. Maurer (3d Cir. 2005) 424 F.3d 303, 316-319; *People v. Cruz* (1978) 83 Cal.App.3d 308, 318; *People v. Hill* (1983) 148 Cal.App.3d 744, 753-756.) Here, there is no doubt that a serious conflict existed between appellant and counsel over appellant's fundamental right to plead guilty; and that the municipal court made no inquiry into that conflict. (See Arg. 1, *ante.*) The lower court should have, but failed to, ask appellant whether he was seeking to waive counsel due to the conflict with counsel; and, if so, the court should have attempted to resolve that conflict.

The unaddressed and unresolved conflict between appellant and counsel was a "subverting factor" that negated the voluntary and intelligent showing required for a valid waiver of counsel. (See *Von Moltke v. Gillies* (1948) 332 U.S. 708, 729 (conc. opn. of Frankfurter, J.); see also *Faretta v. California*, *supra*, 422 U.S. at p. 835; *Godinez v. Moran* (1993) 509 U.S. 389, 400-401, & fn. 12.)

2. <u>The Municipal Court Failed to Advise Appellant That, Even If He Waived His Right to Counsel, He Could Not Plead Guilty</u>

Appellant's request to waive counsel came *one week* after counsel was allowed to thwart appellant's stated intent to plead guilty. The timing of these two events demonstrates that appellant's request stemmed, at least in part, from a belief that a guilty plea could be accepted after counsel was discharged.

Under section 1018, however, a capitally-accused defendant cannot plead guilty without the consent of counsel, even if he waives his right to counsel. The municipal court was presumably aware of that rule. (See *People v. Braxton* (2004) 34 Cal.4th 798, 814 [lower courts are presumed to know the law].) But it failed to ensure that appellant was aware of the rule.

The record does not show that appellant was otherwise aware that a guilty plea could not be accepted even if he waived his right to counsel. There was no mention of either section 1018 or its requirements during the *Marsden*,

plea, or *Faretta* proceedings. Indeed, appellant's attempts to plead guilty after counsel was discharged indicate that he was unaware of that rule. (See § C, *post*.) [34]

Before granting appellant's request to waive his right to counsel, the municipal court was required to ensure that he was aware of the facts and circumstances that were essential to a comprehensive understanding of the matter. (*Von Moltke v. Gillies*, *supra*, 332 U.S. at pp. 723-724 (plur. opn.).) It failed to do so. In the absence of a showing that appellant was aware of the facts necessary to his understanding of the significance and consequences of waiving counsel, the court erred in accepting a waiver of that right.

3. The Municipal Court's Inquiry Was Insufficient to Support a Valid Waiver of Counsel in a Capital Case

The high court has "imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." (*Patterson v. Illinois* (1988) 487 U.S. 285, 298.) Thus, when faced with a request for self-representation, a lower court "must make the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." (*People v. Stanley* (2006) 39 Cal.4th 913, 932, quoting *Faretta v. California*, *supra*, 422 U.S. at p. 835, internal quotation marks omitted.)

In assessing the adequacy of a lower court's inquiry into the waiver of counsel, a reviewing court asks "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could

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34. Months later, the prosecutor informed appellant both off the record and in open court that "by law he cannot plead guilty to a special circumstances allegation case. . . . I told him no judge can accept your plea." (Municipal Court RT 160-161.)

provide to an accused at that stage . . . ." (*Patterson v. Illinois*, *supra*, 487 U.S. at p. 298.) As *Faretta* was a noncapital case, its discussion of the dangers and disadvantages of self-representation was directed to the guilt stage. (*Faretta*, *supra*, 422 U.S. at pp. 807, 818-821, 834-835.) Defending guilt proceedings without counsel "can be a mystifying process even for well-informed laypersons." (*Gonzalez v. United States* (2008) __ U.S. __, 128 S.Ct. 1765, 1770.)

Defending a capital case without counsel presents dangers and disadvantages to the accused that are both distinct and heightened. A capital case is challenging even for experienced lawyers. The penalty phase is a highly specialized proceeding that differs fundamentally from the guilt phase. (See *California v. Ramos* (1983) 463 U.S. 992, 1007; *People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1235-1236; see generally Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases* (1997) 66 Fordham L.Rev. 21.) Accordingly, defense counsel in capital cases "has duties and functions definably different from those of counsel in ordinary criminal cases." (American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) 31 Hofstra L.Rev. 913, 923.) Counsel must not only "be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns," but must also be able "to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation . . . ." (*Ibid.*)

In light of the distinct and heightened dangers and disadvantages of proceeding without counsel in a capital case, and given that the focus when assessing a waiver of counsel must be on "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage" (*Patterson v. Illinois*, *supra*, 487 U.S. at p. 298), the requisite inquiry into a waiver of counsel in a capital case differs

from that required in a noncapital case. (See *Shafer v. Bowersox* (E.D.Mo. 2001) 168 F.Supp.2d 1055, 1082-1084; *Lamar v. State* (Ga. 2004) 598 S.E.2d 488, 492 ["We recognize that the requisite colloquy between a trial court and any criminal defendant regarding the potential dangers and disadvantages of self-representation may be more involved and detailed in a death penalty case than in some other criminal cases"].)

In this case, appellant was aware that he was defending against a capital charge. (Municipal Court RT 10-15; see also Municipal Court RT 32-35.) But the municipal court did not inquire into appellant's understanding of capital case proceedings, and did not make him aware of the specific dangers and disadvantages of proceeding without counsel in such proceedings, or of the fundamental legal rights and issues that would be affected by that decision. (Municipal Court RT 10-15, 32-35.) For example, appellant was not made aware of the dangers and disadvantages of proceeding without counsel with regard to death-qualification of capital sentencing jurors, the nonapplicability of the presumption of innocence at the penalty phase, the concept of mitigation and the significance and consequences of failing to present such evidence, the concept of aggravation and appropriate evidence under the aggravating factors, and the tasks assigned to the capital sentencing jurors. Although "technical legal knowledge, as such, [is] not relevant to an assessment of [a defendant's] knowing exercise of the right to defend himself" (*Faretta, supra*, 422 U.S. at p. 836), questioning on these topics was relevant to determine whether appellant's waiver of counsel was intelligent and voluntary.

Nor did the waiver-of-counsel form completed by appellant at the November 7, 1996, proceeding advise him of the dangers and disadvantages of proceeding without counsel in a capital case, or of the fundamental legal rights and issues that would be affected by his decision. (Municipal Court CT 51.) That form is adapted to a typical, noncapital felony case, and makes no

mention of the distinct dangers and disadvantages to the accused of defending a capital case without counsel. Neither that form nor the court's inquiry sufficed to establish a valid waiver of appellant's right to counsel.

In *People v. Riggs* (2008) 44 Cal.4th 248, a capital case, the defendant argued that the *Faretta* colloquies conducted by the lower courts were inadequate in failing to mention "'the factors that are unique to a death penalty case'" (*id.* at p. 275), including that guilt and penalty phase defenses might in some cases be in conflict, the burden of proof differs between the two phases of a capital trial, and some evidence might be admissible at the penalty phase that would not be admissible at the guilt phase. This Court disagreed, concluding that such advisements:

> are each aspects of the substantive law of a capital case, not dangers and disadvantages arising from a decision to represent oneself in a capital trial. Those and a multitude of other legal aspects of trying a capital case are at issue regardless of whether the defendant opts for self-representation or is represented by counsel.

(*Ibid.*) This Court concluded that it was sufficient to advise the capitally-accused defendant that "defending against capital charges is a complex process involving extremely high stakes and technical rules defendant would be expected to follow despite his likely unfamiliarity with them, and that defendant's ability to defend himself might be hampered by his incarceration and lack of training." (*Id.* at pp. 277-278; see also *People v. Lawley* (2002) 27 Cal.4th 102, 140-141; *People v. Blair* (2005) 36 Cal.4th 686, 709-710.)

Appellant acknowledges that the warnings he received were similar to those upheld by this Court in *Lawley*, *Blair* and *Riggs*. He respectfully requests this Court to reconsider those decisions, and conclude that the distinct and heightened dangers and disadvantages of proceeding without counsel in a capital case requires a lower court to conduct a more searching inquiry into a defendant's waiver of counsel.

C. The Lower Courts Erred by Failing to Address and Grant Appellant's Request to Reappoint Counsel

Even if appellant's waiver of counsel in municipal court were valid, on several subsequent occasions he asked the lower courts to reappoint counsel. On January 23, 1997, while the case was still in municipal court, appellant appeared in chambers before Superior Court Judge Millard regarding section 987.9 matters, and asked to have the public defender reappointed for the penalty phase:

> I would like to ask the Court to go public and allow me to enter a change of plea. After I enter a change of plea and make my plea, I would like to request a waiver of -- well, by pleading guilty, I will be waiving my preliminary examination. I'd like the Court to take my waiver of rights and schedule me on calendar for Department 5 Superior Court arraignment for schedule for trial for the penalty phase for February 5th and appoint the Public Defender's Office. I've already talked to [the public defenders and they are] willing to take the case on as soon as I plead guilty to the criminal aspect and set for Superior Court arraignment to set for trial for the penalty phase.

(Jan. 23, 1997 RT 21-22.) The court concluded that "the issue as to whether or not you're going to plead guilty or waive a preliminary hearing is really not before me today." Appellant answered, "I would like it to be before you because it would handle a lot of these other matters." (Jan. 23, 1997 RT 24.) Ultimately, despite repeated requests by appellant, the court did not reappoint counsel and would not accept appellant's plea. (Jan. 23, 1997 RT 30, 34-36, 41-42)

Pursuant to Judge Millard's promise to make arrangements for appellant to discuss his "desires" with Judge Crandall (Jan. 23, 1997 RT 30-31, 41-42, 63), the minute order for the January 23 hearing states, in part:

> Defendant's oral request that preliminary hearing in Div. 311 be advanced and waived, that defendant be allowed to change his plea to a guilty plea and that the Public Defender be appointed to represent defendant. Court orders that Div. 311 be contacted by

> the court clerk and that defendant's requests be expedited in Div. 311.

(987.9 July 14 Supp. CT 49.) When appellant appeared in Division 311, however, Judge Crandall was "not absolutely certain" as to the reasons for his appearance. (Municipal Court RT 159.) Appellant began by informing the court of his desire to plead guilty:

> The guilt of my crime has been weighing heavily on me with a remorseful heart. I would like to offer a change of plea and enter a plea of guilty to murder in the first degree and admit the special circumstances and waive all appellate rights at this time.

(Municipal Court RT 159.) Before appellant could ask for reappointment of counsel, as he had done before Judge Millard several days earlier, and as set forth in the January 23 minute order, the prosecutor suggested that he speak to appellant off the record. (Municipal Court RT 160.) He did so, and then informed the court:

> I had a brief conversation with Mr. Frederickson in the presence of Mr. Freeman and I had suggested to Mr. Frederickson that he seriously reconsider his thoughts about what he was planning on doing.
>
> He wants to plead guilty to the charges. I told him by law he cannot plead guilty to a special circumstances allegation case. He understands that, but I told him no judge can accept your plea.
>
> Furthermore, I told him that it was my opinion Mr. Freeman would offer him the best possible representation and suggested that he follow Mr. Freeman's advice on the matter. [¶] It's my understanding Mr. Frederickson despite Mr. Freeman's conversations with him and my own conversations with him in Mr. Freeman's presence Mr. Frederickson still wants to plead guilty, although I think he realizes that he cannot.
>
> I think it's his desire to actually waive the preliminary hearing which is still scheduled for February 5th. [¶] My last suggestion to him was not to do anything today. That we just come on February 5th and have more of a chance to think about it, to talk to Mr. Freeman, or talk to his investigator and then he can decide what he wants to do on the 5th.

(Municipal Court RT 160-161.)

Judge Crandall agreed that appellant could not unilaterally waive the preliminary hearing (Municipal Court RT 161-162), and told appellant to come back in a week and decide whether he wanted to waive the preliminary hearing. (Municipal Court RT 160-161.) The court did not address appellant's request to plead guilty, or his request -- referred to in the January 23 minute order -- to have the Public Defender reappointed. (Municipal Court RT 161-162.)

The lower courts erred in failing to address and grant appellant's request for counsel. A decision to waive counsel is not "cast in stone"; the right to counsel may be reasserted at any time. (*Menefield v. Borg* (9th Cir.1989) 881 F.2d 696, 700; *People v. Crayton* (2002) 28 Cal.4th 346, 365.) At a minimum, a lower court must address the request. (See *United States v. Fazzini* (7th Cir. 1989) 871 F.2d 635, 643.) And, when a request for reappointment of counsel is made, as here, well before trial, particularly in a capital case where representation is crucial, it must be granted: "The functional right of a defendant to withdraw his request to represent himself and reassert the right to counsel at any time immediately before, or perhaps even during trial, is, absent deliberate manipulation, *virtually assured.*" (*Horton v. Dugger* (11th Cir. 1990) 895 F.2d 714, 716, emphasis added; see also *United States v. Taylor* (5th Cir. 1991) 933 F.2d 307, 311; *Buhl v. Cooksey* (3d Cir. 2000) 233 F.3d 783, 800.)

Here, appellant requested counsel before the preliminary hearing, and eight months before trial. There is no suggestion of manipulation; the record simply shows a defendant in peril of his life asking the courts to appoint counsel. [35]

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35. In *People v. Gallego* (1990) 52 Cal.3d 115 and *People v. Lawley* (2002) 27 Cal.4th 102, this Court addressed the issue of whether a lower court errs when

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It is true that appellant's request for counsel was made simultaneously with his request to withdraw the not guilty plea entered by counsel. The lower courts, however, did not inquire of him whether, given that he could not plead guilty (but see Arg. 1, *ante*), he still desired counsel for the penalty phase. In this unique setting, there was no valid waiver of counsel and the lower courts erred in failing to grant appellant's requests.

D. <u>There Was No Valid Waiver of Counsel in Superior Court</u>

Under section 987, subdivision (b),[36] a defendant in a capital case must be readvised of the right to counsel when arraigned in superior court on the information. (*People v. Crayton*, *supra*, 28 Cal.4th at pp. 360-362.) That requirement is intended to provide a "safeguard" for the right to counsel. (*Id.* at p. 364.)

In this case, that safeguard failed. When appellant was arraigned in superior court on February 24, 1997, the court made no mention of his right

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it denies a *mid-trial* request for reappointment of counsel. In both cases, this Court concluded that such a ruling is subject to an abuse of discretion standard, and set forth a number of relevant factors (e.g., the reasons for the request, disruption or delay which might result from granting the request, etc.). (*Gallego*, *supra*, at pp. 163-164; *Lawley*, *supra*, at pp. 149-150.) Appellant's request for reappointment of counsel, however, was made before the preliminary hearing and was clearly timely. Absent "deliberate manipulation" (*Horton v. Dugger*, *supra*, 895 F.2d at p. 716), it should have been granted. This is particularly true given that the reason why appellant lacked counsel was because he was essentially forced to waive his right to counsel in order to plead guilty. (See Arg. 1, *ante*.)

36. Section 987, subdivision (b) provides, in part:

> In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him or her that he or she shall be represented by counsel at all stages of the preliminary and trial proceedings and that the representation is at his or her expense if he or she is able to employ counsel or at public expense if he or she is unable to employ counsel . . . .

to counsel. (1 RT 4-13.) Several weeks later, at a hearing on March 14, 1997, the prosecutor observed that no waiver of counsel had been taken in superior court, and requested the court to do so. (1 RT 86.) The superior court, after providing appellant with a "petition to proceed in propria persona" (1 CT 110-113), began to explain the right to a jury trial, but interrupted itself and stated that the minute order for a hearing on February 28, 1997, showed that Judge Millard had explained appellant's rights to him. When the court asked appellant if this were so, appellant responded:

> Yeah, I'm fully aware of my rights. I'm making a knowing and intelligent waiver of my rights. I understand that this is a death penalty case and that the maximum term is death by lethal injection, and the minimum term, mandatory minimum is life without the possibility of parole.

(1 RT 88.) The court replied, "As long as this has all been gone over with you by Judge Millard, I'm satisfied." (1 RT 89.)

Contrary to the court's assumption, the minute order for the proceeding on February 28, 1997, contains no mention of a *Faretta* waiver or an explanation of rights. (987.9 July 14 Supp. CT 87-88.) Nor does the reporter's transcript for that date reflect any such waiver or explanation of rights. (1 RT 44-79.)

The fact that the lower court provided appellant with a form petition for self-representation did not suffice to comply with section 987, subdivision (b). As with the form used by the municipal court, the form provided by the superior court is adapted to a typical, noncapital felony case, and makes no mention of the distinct dangers and disadvantages to the accused of defending a capital case without counsel. Moreover, such forms "must be seen as no more than a means by which the judge and the defendant seeking self-representation may have a meaningful dialogue concerning the dangers and responsibilities of self-representation." (*People v. Silfa* (2001) 88 Cal.App.4th 1311, 1322; cf. *People v. Blair*, *supra*, 36 Cal.4th at p. 709 [concluding that a

failure to give warnings orally "does not necessarily invalidate [the] defendant's waiver"].) In this case, *no* dialogue occurred, due to the court's mistaken assumption that another court had performed that function.

In addition, the superior court failed to make appellant aware of the dangers and disadvantages of self-representation, and the fundamental legal rights and issues involved, when an accused enters a plea of not guilty by reason of insanity. Appellant entered that plea, and the court appointed sanity experts, several weeks before his putative waiver of counsel in superior court. (1 RT 4-5, 8-11, 86-89.) The court failed to make appellant aware of the legal rights and issues involved in such cases, including, inter alia: the mandatory examination by the sanity experts, counsel's presence at the examination, and the admissibility of statements made during the examination. (See *People v. Arcega* (1982) 32 Cal.3d 504, 521; *In re Spencer* (1965) 63 Cal.2d 400, 409-413; *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 469.)

Accordingly, appellant did not validly waive counsel in the superior court.

E. The Entire Judgment Must Be Reversed

With regard to the absence of a valid waiver of counsel in municipal court, appellant was denied his state and federal constitutional right, and his statutory right, to counsel at all stages of his capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; §§ 686, 686.1, 859, 987, subd. (b).) That error requires reversal of the entire judgment: "[T]he failure to meet the requirements for a valid *Faretta* waiver constitutes per se prejudicial error, and the harmless error standard is inapplicable." (*United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167; see also *Perry v. Leeke* (1989) 488 U.S. 272, 279-280; *People v. Benavides* (2005) 35 Cal.4th 69, 86 ["A complete denial of counsel at a critical stage of the proceedings . . . gives rise to a presumption that the trial was unfair"].)

Even if the denial of counsel were subject to harmless error review, appellant would be entitled to relief under any standard of review. The error resulted in appellant being counseled by the person charged with seeking his death: the prosecutor here advised appellant not to seek the reappointment of the Public Defender counsel, but rather to remain in propria persona and defend the case with Freeman. A prosecutor is obliged "to accord to defendants their constitutional rights" (*Reaves v. Superior Court* (1971) 22 Cal.App.3d 587, 596), not recommend that a defendant proceed without counsel. Further, the prosecutor misled appellant regarding his rights: "I told him by law he cannot plead guilty to a special circumstances allegation case. He understands that, but I told him no judge can accept your plea." (Municipal Court RT 160-161.) If counsel were reappointed, appellant could have entered a guilty plea, with counsel's consent.

Further, the prosecutor took advantage of the absence of counsel at the penalty phase (1) by improperly placing before the jury a variety of inadmissible evidence in various prison packets and court documents, ostensibly as proof of prior convictions and prior acts of violence; and (2) by improperly introducing rebuttal evidence in its penalty phase case-in-chief. [37]

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37. In its penalty phase case-in-chief, the prosecution presented testimony concerning appellant's putative negative character, lack of remorse, failure to accept responsibility, lack of adjustment in prison, and lack of conscience; and it presented testimony concerning appellant's putative lack of mental illness. (E.g., 14 RT 2573-2575 [Fisher testimony], 2639-2646 [Kralick testimony], 2594-2625 [Dr. Howell testimony], 2672-2673 [Dr. Flores testimony]; 15 RT 2732-2737 [Dr. MacGregor testimony], 2741-2764, 2766-2808 [Dr. Mayberg testimony].) Under this Court's holding in *People v. Boyd* (1985) 38 Cal.3d 762, 772-776, the prosecutor's action was improper because evidence of the defendant's character and background must not be introduced by the prosecution as part of its case in chief at the penalty phase. Moreover, a number of the prosecution's penalty phase exhibits contain inadmissible and damaging information. For example, documents in Exhibit 58 refer to bail

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Under any conceivable standard of review, reversal is required.

With regard to the failure of the lower courts to reappoint counsel despite appellant's requests, although several California appellate courts have employed a state-law harmless error analysis in determining whether such error was prejudicial (e.g., *People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1127; *People v. Sampson* (1987) 191 Cal.App.3d 1409, 1418), the error infringed appellant's right to counsel under the federal Constitution and is, therefore, reversible per se. (See *Robinson v. Ignacio* (9th Cir. 2004) 360 F.3d 1044, 1059-1061; *Menefield v. Borg*, *supra*, 881 F.2d at p. 701 & fn. 7; *United States v. Taylor*, *supra*, 933 F.2d at pp. 311-313; *United States v. Pollani* (5th Cir. 1998) 146 F.3d 269, 273-274.)

With regard to the failure to readvise appellant of the right to counsel when he was arraigned in superior court, in *People v. Crayton*, *supra*, 28 Cal.4th 346, a noncapital case, this Court concluded that such error is state-law error only (*id.* at pp. 362-365), and subject to the standard of review set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836: whether there is a "reasonable probability" that the defendant "would have accepted the appointment of counsel had the court made the statutorily required inquiry at arraignment." (*Crayton*, *supra*, at p. 365.) This Court found no such probability in *Crayton* because the defendant remained "unwavering" in his desire to represent himself despite being repeatedly warned of the risks of representing himself at trial. (*Id.* at pp. 365-366.) This Court noted, however, that where a defendant

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and sentencing matters; documents in Exhibit 59 refer to appellant's prison history, including parole information and arrests; documents in Exhibit 62 refer to appellant's prison history and arrests. (Exhs. 58-63, 67-69.) Such nonstatutory information was inadmissible at the penalty phase. (See *id.* at p. 775 [aggravating evidence limited to statutory categories].) Appellant, forced to proceed without counsel, raised no objection to these improper actions by the prosecution.

"expressed equivocation in the municipal court proceedings as to whether he desired to represent himself and, if so, at what stages of the proceedings," a superior court's failure to readvise him of the right to counsel "might well be prejudicial under the *Watson* standard." (*Id.* at p. 365.)

In this case, the record shows that appellant's "desire" to represent himself vacillated over the course of the pretrial proceedings. He made clear to the municipal court that he did not want to proceed without counsel; and, on several occasions, he sought to have the Public Defender reappointed to represent him. When these facts are considered together with the lower courts' failure to warn appellant of the specific dangers and disadvantages of proceeding without counsel in a capital case (or at sanity phase proceedings), a reasonable probability exists that appellant would have accepted appointment of the Public Defender had he been readvised of that right in superior court.

Reversal is also required under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution, which require that the procedures that lead to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) The ultimate purpose of the right to counsel is "to protect the fundamental right to a trial that is both fair in its conduct and reliable in its result." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; see also *Strickland v. Washington* (1984) 466 U.S. 668, 684-685.) When, as here, the accused does not have the guiding hand of counsel at the penalty phase of a capital case, a substantial risk exists that the sentencing hearing will be neither fair nor reliable: "an inadequate and incompetent presentation by a pro se defendant in a penalty trial unacceptably poses a risk to the State of executing a defendant whose individual character and record do not warrant the ultimate punishment." (*State v. Reddish* (N.J. 2004) 859 A.2d 1173, 1201.)

That risk is unacceptable when life is at stake. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).) The death judgment must therefore be reversed.

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3. THE TRIAL COURT PREJUDICIALLY ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE STATEMENTS ELICITED FROM APPELLANT DURING CUSTODIAL INTERROGATION IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Factual Background

1. The Two Interrogations

Appellant was arrested after 5:00 p.m. on June 14, 1996, the day after the killing, and was interrogated at 7:30 p.m. in a small room at the Santa Ana Police Department by homicide investigators Phil Lozano and Mark Steen. (Accuracy Supp. CT 7, 13 [search warrant]; 2 RT 276-277.) Before advising him of his constitutional rights, the investigators first questioned appellant regarding his identifying information, employment, tattoos, gang affiliation, drug use, parole status, and prior offenses. (1 CT 295-300 [unredacted transcript of interrogation].)

Investigator Steen then read aloud from an "advisement of rights form":

> Let me read your rights to you. Daniel, you have the right to remain silent.
>
> Daniel, anything you say may be used against you in court.
>
> Daniel, you have the right to an attorney before and during any questioning.
>
> Daniel, if you cannot afford an attorney one will be appointed to you before questioning if you wish.

Each advisement was followed with the question, "Do you understand that?" To each question, appellant responded, "Yes, sir." (1 CT 300.)

Steen then asked, "Daniel, can we talk about what happened? And I'm referring to the uh, to the shooting at the Home Base which is what we're investigating at this time." Appellant responded, "I'll talk about as much as I understand about it." Steen filled out and obtained appellant's signature on

the advisement form, and continued the questioning. (1 CT 301; Exh. 17 [advisement of rights form].)

Steen questioned appellant about his work for Marilee Thompson and his use of her van. (1 CT 301-303.) He also informed appellant that "you're arrested for murder. Shooting at a Home Base robbery that occurred yesterday[.]" (1 CT 302.)

Steen next questioned appellant about his activities on the date of the killing, but did not obtain an admission of involvement in the crime. (1 CT 304-308.) He then confronted appellant with the fact that a pistol had been located in his camper; appellant stated that he found the gun two days before the shooting, and could not recall whether he had shot it. (1 CT 308-309.) Steen continued questioning appellant about his activities on the day of the killing and the location of the pistol. (1 CT 309-313.)

Steen then asked whether appellant was familiar with the Home Base store where the shooting occurred. Appellant stated that he had been to the store many times, but could not remember the last time, and became confused over whether Steen was referring to a Home Base or a Home Depot. Steen turned the questioning back to appellant's activities on the day of the shooting. (1 CT 314-315.)

Appellant then asked about calling his attorney, leading to the following exchange:

> [Appellant]: Hey, when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon.
>
> Steen: Your lawyer? Well you can call your lawyer after we're done in our facility.
>
> [Appellant]: Oh, okay. So what do we got to do in our facility here?
>
> Steen: Well we're conducting this interview.

[Appellant]: Oh, okay. Can we finish tomorrow?

Steen: Um, we can continue talking tomorrow however we're not going to continue the interview.

[Appellant]: Oh, okay.

Steen: I mean, we can talk again.

[Appellant]: Okay.

(1 CT 315-316.) [38]

Steen turned the discussion away from appellant's request by describing the circumstances of the shooting and confronting appellant with evidence showing his guilt. He then expressed his belief in appellant's guilt: "I'd just like to kind of want to know if we can maybe more or less be honest about it now and get down to why it happened." (1 CT 316-317.) He also referred to appellant's "elderly grandmother," and stated that the arrest occurred away from his home because "old people have heart attacks you know?" (1 CT 317)

At that point, appellant acknowledged having been to the Home Base store the morning of the shooting, but was apprehensive about speaking further. (1 CT 318-319.) Steen sought to allay that fear:

> We've already talked about how you called the police. You talked to the officer, we know that. And your statements that you made to the officer intrigue me. They really do. And you sound like a guy that was remorseful for, you know, like it was an accident.

(1 CT 319.)

Appellant then admitted his involvement in the homicide. He confirmed that he went to the Home Base with a "game plan," and that he

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38. Appellant was not able (or allowed) to make a phone call until 11:00 p.m., six hours after his arrest and two hours after the interrogation. (9 RT 1769-1770, 1795; see also 3 RT 364-366.)

looked around the store to get a "feel for the place." He followed the manager as the latter went to the safe for change. While the manager was at the safe, appellant leaned behind the display counter and said "excuse me." The manager looked up and appellant asked "Can you put that money in this box?" The manager looked back down, picked up a stack of five-dollar bills, and started counting them. Appellant thought this "non-sensible" and showed the manager the pistol in the holster. The manager closed the safe, stood up and looked at appellant, and without a word, proceeded to walk away. (1 CT 322-324.) Appellant followed and "the next thing I knew um, you know I was at his temple." The pistol "came out" and he fired one shot just above the manager's right ear. "[T]he aiming and the, and the firing was all like at one time." The flash and sound and "sudden violence" shocked appellant to the ground. (1 CT 324-325, 337-339.)

Appellant cried when describing the shooting. (1 CT 325-328.) He had never wanted to kill anyone and could not explain why he pulled the trigger: "I didn't, I didn't think about it. It was just, it happened." He described it as a "reflex" but was "not saying it was accidental[.]" But he "did not make a conscious decision to do it." (1 CT 324-325; 338-339.) He was frustrated that the manager had not simply given him the money. (1 CT 339-340.) He also expressed regret: "I, I, I shouldn't of killed him. I, I didn't plan on killing him. I didn't make a decision to kill him but I did, you know. It just . . . my hand came up and, and it just happened." (1 CT 340.)

After the shooting, appellant ran out of the store, and left in the van. He later called the store and spoke to a vice-president. (1 CT 325-327.)

The night before the shooting, appellant arranged to buy a pistol, thinking that "if I get caught you know I'll go back in for about two or three years and you know[.]" He made a holster and borrowed the neighbor's van because he was "planning on doing a robbery." (1 CT 330-332, 335-336.)

From the time of his release from custody eight months prior, appellant had been "trying to make a go of it," but then just "gave up." (1 CT 334-335.) He had not "worked steady since January," had no money, and was "living out of a camper." Shortly before the shooting, he argued with his grandparents and decided that he had "to take action." (1 CT 329-330.)

He denied being under the influence of alcohol during the shooting, but acknowledged that he had been injecting drugs "[p]robably about three times a week." (1 CT 328-329, 332-333.) The last time he had injected was "um Tue [*sic*], Wednesday, Monday, Monday, Monday night. Tuesday a.m." (1 CT 328.) He did not ingest methamphetamine the day of the shooting, and "was in [his] right mind." (1 CT 333.)

On June 18, 1996, the Orange County Public Defender was appointed to represent appellant. (Municipal Court RT 4-5.) One month later, on July 16, 1996, appellant filed a motion seeking to proceed in propria persona. (987.9 July 17 Supp. CT 1.) A hearing on that motion did not occur until August 22, 1996. (Municipal Court RT 9.)

In the meantime, on July 25, 1996, appellant sent a letter to Investigator Lozano stating that "we need to talk" about accomplices. (Exh. 20.) On August 12, 1996, Lozano and Steen again interrogated appellant at the jail. (Exhs. 21-23.) After being advised of his rights, appellant gave somewhat disjointed statements regarding a possible accomplice. He admitted that the pistol he procured through McCanns was the one used at the Home Base (4 CT 1248, 1254-1255), that McCanns was aware that appellant "was going to do a robbery" (4 CT 1259-1260), and that he discussed the shooting with McCanns afterwards (4 CT 1273-1274, 1281).

2. <u>The Motions to Suppress and the Suppression Hearing</u>

On June 23, 1997, appellant filed a pretrial motion in the superior court to suppress the statements made during the June 14 interrogation, and to set

aside the information based on the failure to suppress those statements. (1 CT 195-211, 212-220.) On September 8, 1997, he filed a motion to suppress statements from the June and August interrogations. (1 CT 385-397.) The prosecution filed written oppositions to the motions. (1 CT 276-287 [opposition to motion to dismiss]; 1 CT 288-342 [response to motion to suppress]; 2 CT 425-488 [opposition to motion to suppress].)

On September 26, 1997, the superior court held a suppression hearing. (2 RT 274-300.) Steen testified briefly that the June 14 interrogation was tape-recorded and transcribed, that appellant was advised of his rights, and that no promises or threats were made to induce his statements. (2 RT 275-278.) [39] The prosecution introduced a transcript of the interrogation, but not the audiotape recording. (See 3 CT 1107 [Exhibit List, Exh. 1].)

When the trial court asked whether the defense intended to present evidence, "second counsel" Freeman replied, "nothing further, your Honor. We submitted it in our brief" (2 RT 293), referring to three declarations filed in support of the suppression motions. Two of those declarations were relevant to the August 12 interrogation. (See 2 CT 410 [Declaration of Dr. Edward Fisher]; 2 CT 404 [Declaration of former counsel].) The trial court sustained the prosecutor's objections to the introduction of most of the statements in those declarations. (2 RT 294-296.) The third declaration was submitted by appellant, and averred, inter alia, that he had been "in a mental hospital for two years," and, from the time of his release in August 1995, he had "suffer[ed] deep depression." (2 CT 409.) The prosecutor raised no objection to that declaration.

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39. On cross-examination, appellant twice asked Steen whether his response to appellant's request to call his attorney -- "you can call your lawyer after we're done in our facility" -- was "standard procedure." The trial court sustained the prosecutor's relevance objections. (2 RT 280.)

On October 3, 1997, the court denied the motions in a three-paragraph written order. The first paragraph referred to the June 14 interrogation:

> 1) Defendant's statement on page 20 of the 47 page transcript of his June 14, 1996 interview does not constitute a clear request for an attorney. Defendant had been advised of and specifically waived his right to have an attorney present before and during questioning as set forth on page 5 of the transcript. His words "Hey when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon." and the officer's reply of "Your lawyer? Well you can call your lawyer after we're done in our facility." and the defendant's response of "Oh, okay. So what do we got to do in our facility here?" indicate to this Court that the defendant is desirous of speeding up the interview so he can call his lawyer when the interview was over. There is certainly nothing close to a clear request for an attorney.

The second paragraph referred to the August 12 interrogation:

> 2) Because defendant initiated the contact between himself and the police and he signed written waivers to have his attorney present and signed written *Miranda* waivers, defendant can hardly complain that his statements were coerced, involuntary or in violation of his right to counsel. [*People v. Sultana* (1988)] 204 Cal.App.3d 511 and [*People v. Stephens* (1990)] 218 Cal.App.3d 575.

The third paragraph concluded:

> 3) Defendant failed in his attempt to present evidence of any mental defect that would prohibit him from understanding and or waiving his *Miranda* rights. [*People v. Cox* (1990)] 221 Cal.App.3d 986.

(2 CT 491; see also 2 RT 307.)

On October 20, 1997, during a pretrial hearing, appellant sought to reopen the suppression motion and informed the court that Wayne Dapser was available to testify that he was appellant's attorney at the time of the first interrogation, and would have advised appellant to cease the interrogation until he spoke with Dapser. The court replied that "any attorney worth his salt is going to tell his client not to talk to the police," but recalled that the

issue was whether appellant had made an unequivocal request for an attorney. It concluded that, "based on the transcript of the proceeding [i.e., the interrogation], there doesn't appear to the court to be an unequivocal request for an attorney." (3 RT 364-366.)

3. The Prosecution's Use of the Interrogation Statements at Trial

Needless to say, the statements elicited from appellant at both interrogations, but particularly those elicited at the June 14 interrogation, figured prominently in the prosecution's case, from guilt through penalty. In his guilt-phase opening statement, the prosecutor characterized the statements as a "confession" to murder and attempted robbery. (8 RT 1301-1304, 1308-1312.) He played the audiotape of the interrogations at trial (redacted in small part) (8 RT 1415, 1422; Exhs. 17-19; 4 CT 1198-1241; Exhs. 22 & 23; 4 CT 1242-1283); and invoked the statements numerous times in his guilt-phase opening argument (10 RT 1999, 2002, 2004-2005) and in his final argument (10 RT 2039-2042, 2044-2046, 2049). At the penalty phase, the prosecutor presented Steen to testify to a number of the more damaging statements appellant made (14 RT 2577-2581), and, in his closing argument, referred to the confessions several times (16 RT 3115-3117, 3131, 3133; see § D., *post*).

B. The Trial Court Erred in Failing to Suppress the Statements Elicited from Appellant During the June 14 Interrogation

The Fifth Amendment privilege against self-incrimination is a fundamental right and protects an accused "from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." (*Schmerber v. California* (1966) 384 U.S. 757, 761; *Malloy v. Hogan* (1964) 378 U.S. 1, 6.) The California Constitution provides an independent privilege against self-incrimination. (Cal. Const., art. I, § 15; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354.)

The privilege is fully applicable during a period of custodial

interrogation by law enforcement (*Miranda v. Arizona* (1966) 384 U.S. 436, 460-461, 467-468 (*Miranda*), which, "by its very nature, isolates and pressures the individual" (*Dickerson v. United States* (2000) 530 U.S. 428, 435). To combat the coercive nature of isolated confinement, a suspect must be advised before being interrogated by law enforcement of his right to remain silent and his right to counsel. (*Davis v. United States* (1994) 512 U.S. 452, 457; *Miranda*, *supra*, at p. 479; *People v. Whitson* (1998) 17 Cal.4th 229, 244.) Any statement, including "nonverbal conduct" that "reflects the actor's communication of his thoughts to another" (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 595, fn. 9 (plur. opn.)), obtained in violation of an accused's rights under the state and federal constitutional privileges against self-incrimination, or the safeguards established to protect those rights, is inadmissible to prove guilt. (See *Dickerson v. United States*, *supra*, 530 U.S. at p. 435; *Miranda*, *supra*, 384 U.S. at pp. 444, 471, 473-474, 476, 478-479; *People v. Sims* (1993) 5 Cal.4th 405, 440.)

The suspect may waive these rights and speak to law enforcement, but the waiver must be knowing, intelligent, and voluntary. (*Edwards v. Arizona* (1981) 451 U.S. 477, 483; *Moran v. Burbine* (1986) 475 U.S. 412, 421-423.) The prosecution bears the burden of proving a *Miranda* waiver "at least by a preponderance of the evidence[.]" (*Missouri v. Seibert* (2004) 542 U.S. 600, 608, fn. 1; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1035.) In assessing a waiver-of-counsel claim, courts must presume that the defendant did not waive his right (*North Carolina v. Butler* (1966) 441 U.S. 369, 373), should indulge every reasonable inference against waiver of the right (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 536-537), and must resolve any doubt in favor of protecting the suspect's constitutional rights (see *Michigan v. Jackson* (1986) 475 U.S. 625, 633). On appeal, this Court applies federal standards when reviewing a claim that statements were elicited in violation of the privilege against self-incrimination (*People v. Gonzalez* (2005) 34 Cal.4th 1111,

1125), and applies the de novo standard of review "insofar as the trial court's underlying decision entails a measurement of the facts against the law" (*People v. Roldan* (2005) 35 Cal.4th 646, 735).

1. The Record Does Not Establish a Valid Waiver of the Right to Counsel

The trial court concluded that appellant "*specifically waived* his right to have an attorney present before and during questioning as set forth on page 5 of the transcript." (2 CT 491, emphasis added.) If true, such an express statement that appellant was willing to talk and did not want an attorney would have been "strong proof of the validity" of a waiver. (*North Carolina v. Butler*, *supra*, 441 U.S. at p. 373.) But the trial court's conclusion is clearly erroneous: page five of the transcript shows only the advisement, followed by Steen's query whether appellant understood, and appellant's response of "Yes, sir." (1 CT 300) That response shows only that appellant understood the advisement; it does not constitute an express or specific waiver of the right to counsel. Merely asking the accused whether he understood his rights does not constitute a valid waiver: "*Miranda* requires the interrogating officer to go further and make sure that the accused, knowing his rights, voluntarily relinquishes them." (*United States v. Porter* (1st Cir. 1985) 764 F.2d 1, 7.) The reason this is so is because "an understanding of rights and an intention to waive them are two different things." (2 LaFave & Israel, Criminal Procedure (3d ed. 2007) § 6.9(c), p. 832.)

Nor is the trial court's finding of a specific waiver supported at page six of the transcript, where the interrogator, after reading the advisements, asked: "Daniel, can we talk about what happened? And I'm referring to the uh, to the shooting at the Home Base which is what we're investigating at this time." Appellant replied, "I'll talk about as much as I understand about it." (1 CT 301; Exh. 19.) Again, nothing in that exchange shows that appellant "*specifically*" waived his right to counsel. Steen did not ask appellant, for

example, if he would speak without consulting an attorney or having one present. (E.g., *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1085-1086 [admonition specifically queried whether the suspect "wished to give up his right to speak with an attorney and to have the attorney present during questioning"]).

Nor does the printed, advisement of rights form establish an express waiver of the right to counsel. The form sets out the advisements read by Steen, followed by the phrase "Expressed Waiver: Can we talk about what happened?" Beside that phrase, Steen handwrote appellant's verbal response: "I'll talk about as much as I understand about it." (1 CT 300-301; Exh. 17.) Nowhere on that form did appellant expressly waive his right to counsel. Indeed, the form did not provide "the option of explicitly requesting an attorney" (see *United States v. Johnson* (4th Cir. 2005) 400 F.3d 187, 196), or explicitly state that the suspect "does not want a lawyer," or "will make a statement without a lawyer." (E.g., *Duckworth v. Egan* (1989) 492 U.S. 195, 198 & fn. 1; *Moran v. Burbine*, *supra*, 475 U.S. at pp. 417-418; *Hart v. Attorney General of State of Florida* (11th Cir. 2003) 323 F.3d 884, 887-888 [question on form asked whether the defendant was willing to answer questions "without the presence of an attorney"].)

An express statement of waiver is not indispensable to a valid waiver of the right to counsel: in some cases "waiver can be clearly inferred from the actions and words of the person interrogated." (*North Carolina v. Butler*, *supra*, 441 U.S. at p. 373; see also *People v. Whitson*, *supra*, 17 Cal.4th at pp. 246-250.) However, in assessing whether a waiver can be so inferred, a reviewing court must bear in mind the presumption against a waiver of rights, particularly in the coercive environment of custodial interrogation. (See *North Carolina v. Butler*, *supra*, at p. 373; *Miranda*, *supra*, 386 U.S. at pp. 456-458, 469-470.) A court cannot presume a valid waiver "simply from the fact that a confession

was in fact eventually obtained." (*Miranda*, *supra*, 386 U.S. at p. 475.)

In *Whitson*, this Court concluded that where a suspect was advised of his *Miranda* rights at the outset of an interrogation, affirmatively indicated that he understood these rights, and never requested the presence of an attorney or indicated that he wished to terminate the questioning, the record supported the trial court's conclusion that the defendant "impliedly" waived his rights. (*People v. Whitson*, *supra*, 17 Cal.4th at pp. 249-250.) In this case, appellant indicated that he understood the advisements that were read to him. But, unlike in *Whitson*, appellant subsequently sought to consult with an attorney ("when am I going to get a chance to call my lawyer"), and asked to stop the interrogation ("Can we finish tomorrow?"). (1 CT 315.) Those requests are inconsistent with an implied waiver of counsel, and do not demonstrate a course of conduct from which waiver may be *clearly* inferred. (See *North Carolina v. Butler*, *supra*, 441 U.S. at p. 373.)

The prosecution failed to carry its burden of showing, under the totality of the circumstances, that appellant made a knowing, intelligent, and voluntarily waiver of his rights before being subjected to interrogation. (See *Moran v. Burbine*, *supra*, 475 U.S. at p. 421.) In the absence of a valid waiver, the statements made during the June 14 interrogation were inadmissible to establish guilt. (*Edwards v. Arizona*, *supra*, 451 U.S. at p. 487; *Miranda*, *supra*, 384 U.S. at pp. 468, 471, 476.)

2. Appellant's Subsequent Request to Call His Attorney Constituted an Invocation of the Right to Counsel

Even if appellant is deemed to have waived his rights by responding to questioning, he subsequently and clearly invoked his right to consult with counsel before making any inculpatory statement.

A suspect who once waives his rights is not thereby disabled from subsequently invoking those rights: if a person subjected to custodial interrogation "indicates in any manner and at any stage of the process that he

wishes to consult with an attorney before speaking there can be no questioning." (*Miranda*, *supra*, 386 U.S. at pp. 444-445; see also *Davis v. United States*, *supra*, 512 U.S. at pp. 457-458; *Edwards v. Arizona*, *supra*, 451 U.S. at pp. 484-485.)

An invocation of the right to counsel "'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" (*Davis v. United States*, *supra*, 512 U.S. at p. 459, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178.) However, if the suspect's reference to an attorney "is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," then cessation of questioning is not required. (*Davis*, *supra*, at p. 459.)

In this case, after being given the advisements, appellant responded to interrogation but did not admit involvement in the crime. (1 CT 301-315.) As the interrogator sharpened his questions, however, appellant asked, "when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon." (1 CT 315.) The trial court concluded that:

> Defendant's statement on page 20 of the 47 page transcript of his June 14, 1996 interview does not constitute a clear request for an attorney. Defendant had been advised of and specifically waived his right to have an attorney present before and during questioning as set forth on page 5 of the transcript. His words "Hey when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon." and the officer's reply of "Your lawyer? Well you can call your lawyer after we're done in our facility." and the defendant's response of "Oh, okay. So what do we got to do in our facility here?" indicate to this Court that the defendant is desirous of speeding up the interview so he can call his lawyer when the interview was over.

(2 CT 491.)

The trial court, quite correctly, did *not* conclude that appellant's

requests were ambiguous or equivocal. Appellant's statement -- "when am I going to get a chance to call my lawyer. It's getting late and he's probably going to go to bed pretty soon" -- contained no qualifying words that might render a request for counsel equivocal or ambiguous such as "maybe" or "I think." (E.g., *Davis v. United States*, *supra*, 512 U.S. at p. 455 ["Maybe I should talk to a lawyer"]; *Clark v. Murphy*, *supra*, 331 F.3d at pp. 1070-1072 ["I think I would like to talk to a lawyer"]; see also *United States v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1076-1077 [defining the terms "equivocal" and "ambiguous"].) The words used by appellant do not indicate indecision or uncertainty. Nor was his request "conditional" upon a future event. (E.g., *People v. Gonzales*, *supra*, 34 Cal.4th at p. 1126 [concluding that a conditional request was "at best" ambiguous and equivocal].)

Instead, the trial court concluded that appellant's "words" and his response to the interrogator's statement indicated that appellant was "desirous of speeding up the interview so he can call his lawyer when the interview was over." That conclusion was erroneous. The court failed to account for the question appellant posed immediately after the exchange quoted by the court: "Can we finish tomorrow?" That question, when read with appellant's initial request to call his attorney, clearly shows that he had an attorney, and that he did not wish to wait to call his attorney until after questioning. That statement indicated that appellant wished to consult with counsel (*Miranda*, *supra*, 386 U.S. at pp. 444-445), and "can reasonably be construed to be an expression of a desire for the assistance of an attorney" (*Davis v. United States*, *supra*, 512 U.S. at p. 459, internal quotation marks omitted). The court erred by failing to "give a broad, rather than a narrow, interpretation" to appellant's request. (*Michigan v. Jackson*, *supra*, 475 U.S. at p. 633.)

In several cases involving words similar to those used by appellant, appellate courts have concluded that the suspect invoked his right to counsel.

In *State v. Dahlen* (Or.App. 2006) 146 P.3d 359, the defendant asked, "When can I call an attorney?" The appellate court concluded that the request "cannot reasonably be said to be equivocal . . . ." (*Id.* at pp. 117-118.) The appellate court viewed the issue as "how defendant's use of the adverb 'when' related to the rest of the sentence 'can I call my attorney,'" and concluded that it "expresses a present desire to do the thing asked about." (*Id.* at p. 118.) Similarly, in *People v. MacNab* (Ill.App. 1987) 516 N.E.2d 547, during custodial interrogation the defendant "either asked, 'When can I speak to a lawyer' or 'Can I speak to a lawyer.'" (*Id.* at p. 159.) He also asked "when he could talk to a public defender, and mentioned the name of a public defender . . . who had been representing him on another matter." The appellate court concluded, "[c]learly this was a request for counsel." (*Ibid.*) And, in *United States v. Giles* (10th Cir. 1992) 967 F.2d 382, the suspect asked "when he would be given an opportunity to talk to an attorney. (*Id.* at p. 385.) The Court of Appeals concluded:

> Although Mr. Giles did not expressly request an attorney, this statement could be reasonably construed to be such a request. In fact, it is more likely than not that Mr. Giles desired to speak to an attorney and only wondered about the procedure relating to such a request. The district court so found. We do not consider such a finding to be clearly erroneous in light of the circumstances.

(*Id.* at p. 386.)

The trial court here also applied the wrong legal standard. The question was not appellant's subjective "desire" as inferred by the court. Instead, the question was whether appellant articulated his desire to consult counsel "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis v. United States*, 512 U.S. at p. 459; see also *People v. Gonzalez*, *supra*, 34 Cal.4th at p. 1124.) In this case, not only would a reasonable police

officer have understood appellant's statement to be a request to consult with his attorney, the record strongly suggests that the interrogator here actually interpreted appellant's question as an invocation of rights. When appellant asked whether they could "finish tomorrow," the interrogator responded, "Um, we can continue talking tomorrow however we're not going to continue the interview." That response shows that the interrogator was aware that if appellant were allowed to contact his attorney, the interview could not lawfully continue. (See *Maglio v. Jago* (6th Cir. 1978) 580 F.2d 202, 205 [officer "clearly interpreted the comment as a request for an attorney, since he immediately said the questioning would have to stop"].)

Even assuming that appellant's requests were not sufficiently clear to invoke his right to counsel, the interrogator's responses to those requests were both misleading and inaccurate. Steen's response to appellant's request -- "you can call your lawyer after we're done in our facility" -- was misleading. In the coercive environment of incommunicado interrogation, that response meant that appellant would not be allowed to telephone his attorney until after the questioning was completed, and served to dissuade appellant from calling and consulting with his attorney. Having been informed that he could not call his lawyer until "we're done in our facility," appellant asked, "So what do we got to do in our facility here?" Steen's answer, "Well we're conducting this interview," implied that appellant could not call his attorney at that moment, and was required to be questioned further before he could call his lawyer. Appellant then asked, "Can we finish tomorrow?" Steen's answer to this question, in addition to revealing his awareness of the legal consequence of permitting appellant to call his lawyer (that the interrogation would cease), was confusing: "Um, we can continue talking tomorrow however we're not going to continue the interview. . . . I mean, we can talk again." (1 CT 315-316.)

In *Davis v. United States*, 512 U.S. 452, the high court concluded that

interrogators are not required to clarify whether or not a suspect actually wants an attorney, but added that "it will often be good police practice" for them to do so. (*Id.* at p. 461.) [40] But *Davis* did not condone interrogators giving misleading or inaccurate statements, such as occurred here, that serve to dissuade a person in custody from contacting and consulting his attorney. (Cf. *People v. Gonzales*, *supra*, 34 Cal.4th at p. 1126 [interrogator's responses to defendant's question provided defendant "an opportunity to clarify his meaning"].)

Moreover, the interrogator's responses were at odds with appellant's constitutional and statutory rights. Appellant had a constitutional right to consult his attorney immediately. (*Edwards v. Arizona*, *supra*, 451 U.S. at pp. 484-485.) He also had a statutory right to do so: section 851.5, subdivision (a), provides that, "no later than three hours after arrest," an arrestee has the right, and must be allowed to, "make at least three completed telephone calls[.]" Appellant was arrested at 5:00 p.m.; the interrogation began at 7:30 p.m., and did not end until shortly before 9:00 p.m. (Accuracy Supp. CT 13-14; 1 CT 295, 342.) His right to make a telephone call under section 851.5, subdivision (a), which has been described as a constitutionally protected liberty interest protected by federal procedural due process (*Carlo v. City of Chino* (9th Cir.1997) 105 F.3d 493, 497-500), had attached at the time of the interrogation.

The record here is silent as to whether appellant was informed of his rights under section 851.5. Compliance with that section requires that the suspect be informed of his right to make the telephone calls. (See § 851.5; *People v. Locke* (1984) 152 Cal.App.3d 1130, 1133.) But compliance with the

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40. The four justices who concurred in the judgment in *Davis* did not agree that the interrogators "were at liberty to disregard Davis's reference to a lawyer entirely . . . ." (*Davis*, *supra*, 512 U.S. at p. 466 (conc. opn of Souter, J.).)

statute also requires that the suspect be "allowed immediately upon request, or as soon thereafter as practicable" to use a telephone for the purpose of securing a desired attorney. (*Ibid.*) Appellant sought to make such a call; the interrogators did not immediately allow him to do so, and misled him as to his right. Their actions were inconsistent with appellant's rights under section 851.5, subdivision (a). (*Ibid*; see also *People v. Leib* (1976) 16 Cal.3d 869, 877.)

Had appellant been permitted to telephone his attorney, as he had the right to do, the legal effect of such a call would have been clear: "in the absence of evidence compelling a contrary interpretation, a telephone call to an attorney must be construed to indicate that the suspect desires to invoke his Fifth Amendment privilege." (*People v. Randall* (1970) 1 Cal.3d 948, 958, disapproved on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510; see also *United States v. Porter*, *supra*, 764 F.2d at p. 6 [suspect's "attempt to contact his attorney constituted an exercise of his right to counsel"]; *Silva v. Estelle* (5th Cir. 1982) 672 F.2d 457, 458-459 [defendant's arraignment request to be allowed the opportunity to phone his lawyer was an unequivocal assertion of the right to counsel].) As a practical matter, as the trial court here recognized, "any attorney worth his salt is going to tell his client not to talk to the police[.]" (3 RT 365.) Because the interrogators undoubtedly knew that, they did what they could to keep appellant from making that call.

Having invoked his right to consult counsel, appellant could not be subjected to further interrogation until counsel was made available to him. (*Edwards v. Arizona*, *supra*, 451 U.S. at pp. 484-485.) As a result, the statements made subsequent to his request for counsel, which were in fact the inculpatory statements relating to the crime, were inadmissible to establish guilt.

3. The Interrogators Failed to Honor Appellant's Invocation of His Right to Cut Off Questioning

The right to cut off questioning is one of the critical safeguards established in *Miranda*: if a suspect "indicates in any manner, at any time . . .

during questioning, that he wishes to remain silent," the police must immediately cease interrogating him. (*Miranda*, *supra*, 386 U.S. at pp. 473-474.) "Through the exercise of his option to terminate questioning [a suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." (*Michigan v. Mosley* (1975) 423 U.S. 96, 103-104.) Without this right, "'the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 180, quoting *Miranda*, *supra*, at pp. 473-474.)

Here, as argued above, Steen told appellant that he would not be able to call his attorney until "after we're done in our facility." When appellant asked what needed to be done "in our facility," Steen answered, "we're conducting this interview," after which appellant asked, "Can we finish tomorrow?" (1 CT 315-316.)

Appellant's questions demonstrate that he was unwilling to discuss the case freely and completely before talking to counsel. He was not required to utter a declarative statement of his intent to cut off questioning: his use of interrogatories sufficed to indicate that intent. (See *People v. Adkins* (Colo. 2005) 113 P.3d 788, 793, fn. 3; see also *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995, 997-998; *Robinson v. Borg* (9th Cir.1990) 918 F.2d 1387, 1391-1393.) As this Court has observed, "no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent." (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.) The right may be invoked "by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*Ibid*; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 829.)

The interrogator was required to "scrupulously honor[ ]" appellant's right to cut off questioning. (*Michigan v. Mosley*, *supra*, 423 U.S. at pp. 103-104.)

He failed to do so. Instead, he responded with the misleading statement "Um, we can continue talking tomorrow however we're not going to continue the interview." (1 CT 316.) The interrogator's responses to appellant's questions served to dissuade appellant from calling and consulting with his attorney, and to keep appellant talking, and were obviously intended to do so. As a result, the statements made subsequent to appellant's request to cut off questioning were inadmissible to establish guilt. (*Miranda*, *supra*, 386 U.S. at pp. 473-474.)

In conclusion, for all the foregoing reasons, the trial court erred in failing to suppress the statements elicited from appellant during the June 14 interrogation

C. The Court Erred in Failing to Suppress the Statements Made by Appellant During the August 12 Interrogation

The trial court also erred in failing to suppress statements appellant made during the postarraignment, August 12 interrogation. During the proceeding at which appellant was arraigned and counsel was appointed, counsel filed an "invocation" of appellant's rights under the state and federal constitutions to remain silent and to have a lawyer present during any questioning. (Municipal Court CT 25; see also Municipal Court RT 5.)

As has been discussed, early in the representation, a conflict between appellant and counsel developed over whether appellant should plead guilty. (See Args. 1-2, *ante*.) On July 16, 1996, appellant filed a short, handwritten motion for self-representation, but a hearing on the motion did not occur until August 22, 1996. (987.9 July 17 Supp. CT 1; Municipal Court RT 9.) One week after filing his motion, appellant sent a letter to Investigator Lozano stating that "we need to talk" about accomplices. (Exh. 20.) Lozano met with the prosecutor to discuss whether appellant's counsel should be contacted before the August 12 interrogation, and was advised that he need not contact appellant's counsel. (2 RT 288-291.) On August 12, 1996, Lozano and Steen interrogated appellant at the jail. In addition to the so-called standard *Miranda*

waivers, the interrogators prepared and had appellant sign the following:

> Daniel Frederickson, we're here because you asked us to be here. We are not making any promises nor are there any guarantees. You are being represented by a Public Defender, who has invoked your right to remain silent with the court. You have the right to have your attorney present while we talk. Do you wish to have him here or do you waive that right? Can we talk?

(2 CT 485, 487) Thereafter, appellant made disjointed statements regarding alleged accomplices, during which he again confessed to the shooting. (4 CT 1248, 1254-1255, 1259-1260, 1273-1274, 1281.)

The trial court concluded that:

> Because defendant initiated the contact between himself and the police and he signed written waivers to have his attorney present and signed written *Miranda* waivers, defendant can hardly complain that his statements were coerced, involuntary or in violation of his right to counsel.

(2 CT 491.) For the following reasons, the trial court erred and the statements made by appellant during the August 12 interrogation should have been suppressed.

First, the August 12 statements resulted from and carried the taint of the earlier June 12 statements taken in violation of appellant's constitutional rights. Where a prior statement is unlawfully obtained, a rebuttable presumption arises that a subsequent statement is the product of the first. To overcome the presumption and show sufficient attenuation to dissipate the taint, the prosecution must demonstrate an independent intervening act sufficient to break the causal chain and establish that the subsequent confession was not obtained by exploiting the illegality of the first. (See P*eople v. Sims*, *supra*, 5 Cal.4th at pp. 444-445; *People v. Storm* (2002) 28 Cal.4th 1007, 1027-1032.)

Here, it is true that nearly two months had passed from the June 12 interrogation, that appellant initiated the contact with law enforcement, and

that he was advised of his rights before the subsequent interrogation. But these facts do not conclusively establish a break in the causal chain or that the subsequent waivers were valid. Appellant mistakenly believed that his earlier "confession" had been validly obtained. His subsequent request to speak to Lozano, and the statements he made during the August 12 interrogation, were fruits of the initial unlawful interrogation and should have been suppressed. (See *Brown v. Illinois* (1975) 422 U.S. 590, 601-604; see also *United States v. Fellers* (2004) 540 U.S. 519, 523-525.)

Second, appellant had a right to counsel under the Fifth and Sixth Amendments at the August 12 postarraignment, custodial interrogation. (See *Michigan v. Jackson*, *supra*, 475 U.S. at pp. 629-630; *Moran v. Burbine*, *supra*, 475 U.S. at p. 431; *People v. Frye*, *supra*, 18 Cal.4th at p. 987.) There is no question in this case that appellant was in fact represented by counsel both at the time he wrote the letter to investigator Lozano, and during the subsequent interrogation. (Municipal Court RT 5; Municipal Court CT 25.)

"Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." (*Patterson v. Illinois* (1988) 487 U.S. 285, 290, fn. 3.) The high court has explained that:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation.

(*Maine v. Moulton* (1985) 474 U.S. 159, 176; see also *id.* at pp. 170-171.)

In this case, the August 12 interrogation occurred after counsel had been appointed for appellant, and after counsel notified the state of his client's invocation of his rights, including his right "to have a lawyer present during

any questioning." (Municipal Court CT 25.) Even though appellant initiated the contact with law enforcement, by approaching appellant without first contacting his attorney, the state violated its "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." (*Maine v. Moulton*, *supra*, 476 U.S. at p. 176.)

Third, in determining whether a waiver of counsel rights is valid, a court must consider whether a suspect's judgment is affected by mental illness. (*People v. Whitson*, *supra*, 17 Cal.4th at pp. 237-241, 248-250; *Miller v. Dugger* (11th Cir. 1988) 838 F.2d 1530, 1539 ["mental illness is certainly a factor that a trial court should consider when deciding on the validity of a waiver"].) The trial court here concluded that appellant "failed in his attempt to present evidence of any mental defect that would prohibit him from understanding and or waiving his *Miranda* rights." (2 CT 491.) To the extent that this conclusion was intended to indicate that no evidence of a mental defect was presented, it is erroneous. Appellant's declaration, submitted in support of his motion to suppress, averred that he had been taking psychotropic medication for depression and anxiety while in jail; that he wrote the July 25 letter because he was devastated and deeply depressed upon becoming aware that a friend had betrayed him to the police; and that he felt a "semi-kinship" with Lozano, having grown up in the same area of Garden Grove; that he had been "in a mental hospital for two years, being released August 95"; and that, since that date, he had "suffer[ed] deep depression." (2 CT 409.) The prosecutor raised no objection to that declaration. Moreover, subsequent to the trial court's ruling, "second counsel" Freeman made an offer of proof for the defense by informing the court that Dr. Edward Fisher, a psychologist appointed by the court to assist the defense, was available to testify and would do so

consistently with his declaration. (3 RT 366.) [41] The court responded, "I think I read and considered that at the time of ruling on the original motion," and concluded that "[a]t this time I don't see any reason to change the Court's opinion." (3 RT 367.) To the extent that the trial court applied a standard that requires evidence of mental illness "that would prohibit [a defendant] from understanding and or waiving his *Miranda* rights," the court also erred. The question is whether a defendant's mental illness affected his ability to make a knowing, intelligent, and voluntary waiver of counsel, not whether such illness would "prohibit" him from doing so.

Fourth, even if the August 12 waivers were valid, this Court should construe the California Constitution to require, as the courts of New York require, that after the right to counsel has attached, police may not question the accused in the absence of counsel unless there is an affirmative waiver, in counsel's presence, of the right. (See *People v. Grice* (N.Y. 2003) 794 N.E.2d 9, 10-13; *People v. Arthur* (N.Y. 1968) 239 N.E.2d 537, 539.) In New York, this "indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel

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41. In his declaration, Dr. Fisher averred that:

> I have examined extensive reports of the mental health history of the defendant Daniel Frederickson, including those of Atascadero state hospital where he was a patient for two years, until August of 1995. [¶] I have had numerous psychological consultations with the defendant and I have administered a series of psychological tests to him. [¶] I have discussed with Mr. Frederickson the condition of his mental health during July/August of 1996. [¶] Based upon all of the aforesaid review, it is my professional opinion that Mr. Frederickson was mentally ill and that his condition had deteriorated significantly during July/August of 1996. His letter to the police of 7/25/96 was a product of this deteriorated mental state.

(2 CT 410.)

and the privilege against compulsory self-incrimination." (*Grice*, *supra*, at p. 10.) The reason for the rule is "to ensure that an individual's protection against self incrimination is not rendered illusory during pretrial interrogation." (*People v. Hawkins* (N.Y. 1982) 435 N.E.2d 376, 381.)

The California Constitution is a document of independent force whose rights "are not invariably identical to" and "not dependent on those guaranteed by the United States Constitution." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325-326.) In particular, the state charter "afford[s] criminal defendants an independent source of protection from infringement of certain rights, including the privilege against self-incrimination" (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 373) and the postarraignment right to counsel (Cal. Const., art. I, § 15; see *In re Lopez* (1970) 2 Cal.3d 141, 145-146).

Appellant respectfully requests that this Court adopt the reasoning and the rule adopted in New York, and conclude that the California Constitution requires that after the right to counsel has attached, police may not question the accused in the absence of counsel unless there is an affirmative waiver, in counsel's presence, of that right.

D. The Erroneous Admission of Appellant's Statements Requires Reversal of the Entire Judgment

The erroneous introduction in evidence of statements elicited in violation of the privilege against self-incrimination is subject to the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24: the state must prove beyond a reasonable doubt that the errors did not contribute to the verdict. (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Sims*, *supra*, 5 Cal.4th at p. 447; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1126.) In assessing whether the state has met its burden, "[a] reviewing court does not examine whether there was sufficient evidence to support the conviction in the absence of constitutional error." (*Ghent*, *supra*, at p. 1127.) The focus must be on "what

the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in this trial was surely unattributable to the error.'" (*People v. Neal*, *supra*, 31 Cal.4th at p. 86, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, ellipses in original; see also *Ghent*, *supra*, at pp. 1127-1131.)

Appellant conceded throughout the trial that he killed the victim. (9 RT 1568-1569; 10 RT 2013-2014, 2019.) The disputed issue at the guilt phase concerned appellant's mental state and intent with regard to the killing and the alleged attempted robbery. On those issues, there is no doubt that the "confessions" elicited from appellant contributed substantially to the verdict.

In his opening statement, the prosecutor promised the jury that it would hear appellant confess to attempted robbery and murder on the audiotape of the June 14 interrogation:

> And about halfway into [the interrogation], Mr. Frederickson finally starts to tell the truth, and he starts to tell them what he did. And what you will hear is that Mr. Frederickson will confess, confess to the attempted robbery and to the murder of Scott Wilson. ¶ He will tell you what he did the night before in his planning. He will tell you how he cased that store that morning, how he identified the manager, how he found out where the safe was, when to strike. He will tell you that through the interview.

(8 RT 1308-1309.) He continued:

> During that interview, June 14th, he explained the robbery was his frustration with life. During that interview he tells the police officers he was not on drugs, not on alcohol, and was clearly of right mind. He knew what he was doing in the planning and the execution of the robbery.
>
> Now, that's the interview of June 14th. So we already have Mr. Frederickson talking to the police officer at Home Base on the telephone call. He's now on June 14th confessed to the attempted robbery and the murder of Scott Wilson.

(8 RT 1310; see also 1311-1312.) True to his word, the prosecutor played the 80-minute audiotape of the interrogation for the jury and provided it with a

transcript. (8 RT 1415; Exhs. 18 & 19; 4 CT 1198-1241; 8 RT 1422.)

The large number of questions and statements during the interrogation relating to appellant's mental state and the attempted robbery special circumstance precludes a verbatim presentation here. The following is a summary:

> Questions by the interrogators assuming that appellant intended to commit a robbery or describing the event as a robbery. (1 CT 302, 303, 316, 318, 328-332, 334, 337, 339.)
>
> Questions and statements concerning past robberies. (1 CT 322-323, 328, 334.)
>
> Questions and statements concerning appellant's motive and reasons for the shooting. (1 CT 318, 324-325, 329-331, 337-339.)
>
> Questions and statements concerning appellant's "game plan" and preparations, including questions about the pistol and holster. (1 CT 318-324, 329-332, 336.)
>
> Questions and statements concerning appellant's thoughts during the shooting. (1 CT 324-325)
>
> Questions and statements concerning his subsequent actions and reactions to the shooting. (1 CT 317, 325-328, 332, 334, 338-339.)

In his opening argument to the jury, the prosecutor relied upon the interrogation and the statements elicited as proof of an attempted robbery:

> "You do not need a corpus for the attempted robbery. His confession is good enough there. . . . His confession suffices by law to make it a good attempted robbery."

(10 RT 1999.)

> [Appellant] was interviewed by the Santa Ana Police Department, Officers Lozano and Steen, and in that interview which you heard at great length and in great detail, great detail, he confesses to the attempted robbery and the murder.

(10 RT 2004.)

> And then finally, on August 12th, 1996, he confesses to the attempted robbery and murder, again, in a second interview to

> the police, and so we have not only Mr. Frederickson being identified being there at Home Base, we also have his confessions to all the things that I list here.

(10 RT 2005.)

In his closing argument, the prosecutor argued:

> [T]his is his statement on June the 14th. He's talking about the robbery. He's giving the police his statement about what he did before and during the robbery. Now, listen to how detailed and how accurate this statement is when you look at it with all the facts.

(10 RT 2044; see also 10 RT 2042.)

> Then as he goes on with his statement, he talks about how, you know, he pulls the gun out to show Scott Wilson that he was serious, that this was a robbery,

(10 RT 2046.)

> [There was] no evidence . . . that suggests that his confessions were at all tainted by anything that was going on in his depressed, so-called depressed, suicidal state at some point in time in 1996, or that there was any mental defect that prevented him from giving a confession to any one of the five or six people that he confessed the attempted robbery and murder to, okay?
>
> [Doctors Rogers and Flores] made it clear to us that they reviewed those same confessions that were on tape to the police, the two that you heard in here, and they made it clear that those confessions were without confusion, uncertainty or disorientation. In other words, those confessions were very clear and had no reason to suspect that anything was affecting the defendant in terms of mentally when he was giving these confessions, and that's the evidence. That's the state of the evidence.

(10 RT 2049.)

The prosecution, given its pervasive use of the unconstitutionally obtained statements, cannot prove that the guilt verdict and special circumstance finding were surely unattributable to the erroneous introduction of those statements.

The errors were also prejudicial at the penalty phase. The jury was instructed at penalty to consider the evidence from the entire trial (16 RT 3079, 3090, 3100), which included appellant's interrogation statements. In his opening statement, the prosecutor reminded the jury of the June 14 interrogation, and promised to play portions of the audiotape "to emphasize the circumstances of the crime, reemphasize it during this penalty phase." (14 RT 2559.) He subsequently did so by having Steen testify to a number of the more damaging statements appellant made. (14 RT 2577-2581.) The June 14 confession was also referred to in the prosecutor's closing argument to the jury at the penalty phase. (16 RT 3115-3117, 3131, 3133.)

This Court has rightfully observed that "the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial under the traditional harmless-error standard." (*People v. Cahill*, *supra*, 5 Cal.4th at pp. 509-510; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 296; *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 424.) Given its pervasive use of the inadmissible and damaging statements elicited from appellant during interrogation, the prosecution cannot prove beyond a reasonable doubt that they did not contribute to the jury's determination that death was the appropriate sentence. Likewise, there is certainly a reasonable possibility that the errors in admitting appellant's statements to the police affected the death verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 437-438.) That sentence must be reversed.

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4. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO SUPPRESS EVIDENCE REGARDING THE SEARCH OF, AND THE SEIZURE OF ITEMS FROM, APPELLANT'S HOME

A. Procedural and Factual Background

On the first day of trial, Santa Ana Police Officer Richard Reese testified for the prosecution that after appellant's arrest, he conducted a search of appellant's home (the camper located on appellant's grandparents' property), where he found and seized a .32-caliber pistol that had been underneath a blanket. (8 RT 1386-1388.) Appellant immediately objected and moved to strike the testimony. After the jury was excused, he argued that there was "[n]o probable cause for the search," that the testimony and the pistol resulted from "an illegal search and seizure," that he was in custody at the time of the search, and that "no exigent circumstances [existed] for them to conduct a search without a search warrant." (8 RT 1389.)

The prosecutor responded with two arguments: the motion should have been made before trial; and the search was "a parole search" conducted by a parole officer. (8 RT 1389-1390.) Appellant replied that insofar as he was in custody at the time of the search, he was no longer on parole. (8 RT 1390-1391; see also 8 RT 1395.)

The trial court focused on the prosecutor's timeliness argument, and asked appellant: "Is there a particular reason why you waited until mid-trial to raise this issue?" (8 RT 1390.) Appellant responded that he was under the impression that the pistol was found pursuant to a search conducted with a warrant. (8 RT 1390-1391.)

The prosecutor and appellant then began discussing various pages of police reports purportedly provided to appellant in discovery. (8 RT 1391-1393.) After the prosecutor informed the court that Officer Reese authored a report indicating that he "located" the pistol, the court asked whether the report mentioned a search warrant. (8 RT 1392.) The prosecutor replied:

"The search warrant that he's talking about comes later when they went back to the camper after this initial parole search." (8 RT 1392.) The court made clear that it was asking "whether or not the defendant was or should have been aware that the firearm was located during a search conducted by Corporal Reese without the benefit of a warrant." (8 RT 1392.) The prosecutor responded:

> Corporate [*sic*] Reese authored a report that is on page 712 of the discovery, which goes into the details of the search. I list the individuals that were involved in the search and the items that were seized in that search. And that page, 712, was given to Mr. Frederickson . . . .

Appellant stipulated that he had that page, but then referred to another page in the discovery:

> Under the heading of "Evidence Items" number two and three are the items that are listed on page 697 of D.A.'s discovery, which is on the search warrant, the velcro -- velcro straps from the holster and the .32-caliber and ammunition. Why would they go get the gun twice?

The prosecutor responded by pointing again to a report by Reese:

> Again, your Honor, I'm just going to refer to page 712 and 713 that lists the items of evidence that Corporal Reese took, which is one chrome four-inch .32-caliber revolver with black grips. There are five rounds in the cylinder, blue nylon holster, and it's a five-page report. It's been in existence. ¶ If the defendant misread, misunderstood, that's not our responsibility.

(8 RT 1392-1393.) Appellant pointed out that the Reese report referred to a velcro bag and rounds of ammunition, and that those were mentioned in the search warrant as well. (8 RT 1393.) Before being cut off by the prosecutor, he tried to explain:

> Why would they have the search warrant for the very same items that they had already taken? I'm seeing the search warrant. I'm seeing these items. I'm seeing the items on page number 712 and 713. To me that's --

> Mr. Tanizaki. Your Honor, see, Mr. Frederickson -- I know the court doesn't have this in front of it.

(8 RT 1393.) The prosecutor then stated that the affidavit submitted in connection with the request for a search warrant mentioned that the revolver, the holster, and the bullets were seized during a "parole search" by Reese and a parole officer. (8 RT 1393-1394.)

The court asked whether the pistol was listed in the return to the search warrant. (8 RT 1393-1394.) The prosecutor did not have a copy of the warrant return, but was given a copy by an officer. He then stated that the return listed "six pairs of men's trousers and a black cloth and velcro straps, no gun." (8 RT 1394-1395.) Appellant asked whether the prosecutor was contending that "this was part of the discovery?" The prosecutor replied, "I frankly do not know where that page is or was." Appellant stated, "I've never seen this page before," and declared, "I'm just becoming aware of it as the officer is testifying." (8 RT 1395.)

The court asked whether there was "any discovery at all that would indicate that the gun was taken during the . . . execution of the search warrant?" The prosecutor replied in the negative. The court then asked whether "Reese's report contain[s] statements that he obtained the gun?" The prosecutor replied in the affirmative, and noted that the report did not mention a warrant. (8 RT 1395-1396.)

The prosecutor offered to submit certain documents to the court: "And the affidavit of that search warrant, we can submit those documents to the court, and you could read it for yourself as to what it says, both his report and the affidavit." The court does not appear to have accepted that offer. (8 RT 1396.) Indeed, there is no indication on the record that the court reviewed any of the police reports, the warrant or the return.

The court observed that under section 1538.5, subsection (h), a motion to suppress may be made during trial if "the defendant was not aware of the

grounds for the motion," and asked, "And that is my concern, that how could you not be aware of the grounds for the motion?" (8 RT 1396.) Appellant reiterated, "I'm just now becoming aware of it, your Honor." (8 RT 1396.) The court replied:

> If there's nothing in any of the discovery to indicate that the weapon was taken during a search pursuant to a warrant, I'm somewhat confused as to how you would not be aware that it was taken by Corporal Reese during his search of the camper.

(8 RT 1396.) Appellant attempted to explain:

> I -- after reading the discovery, I understood that it was taken during Corporal Reese's stay in the -- in the camper, but, once again, as I -- as I state, the front of this section with my discovery it's got what's clearly listed as a search warrant. I've never seen one before, but it has the word "search warrant" in parentheses here on the front of it. And I truly believe that this was a part of this discovery bindle [*sic*], and that it went along with Corporal Reese's report, and, therefore, I had made that assumption. I'm not -- I didn't purposefully wait until now to make this -- this argument, your Honor.

(8 RT 1396-1397.)

The court opined that appellant's in propria persona status was not an excuse for failing to raise the issue earlier:

> [I]f I were to allow this motion to be heard at this time, it would be granting favoritism to an individual who decided to represent himself. I don't believe that it's fair to the process of justice to do that. The defendant, having chosen to represent himself, is bound to know the rules and procedures. I frankly can't see any justification for waiting mid-trial to make a motion to suppress.

(8 RT 1397.) It overruled the objection and denied the motion. (8 RT 1397.)

After resuming his testimony, Reese testified that the pistol seized from appellant's home had one empty and five loaded cylinders, and was not in plain view, but rather concealed under a blanket. (8 RT 1398, 1402.) He also found and seized a blue nylon bag containing numerous rounds of .32-caliber ammunition. (8 RT 1399.) These items and photos thereof were admitted in

evidence. (Exhs. 12-16.) [42]

B. The Trial Court Erred in Concluding That Appellant Should Have Been Aware of the Grounds for the Motion Before Trial

The Fourth Amendment to the federal Constitution affirms "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." (See *Mapp v. Ohio* (1961) 367 U.S. 643, 656-657.) The California Constitution provides a similar guarantee against unreasonable governmental searches and seizures. (Cal. Const., art. I, § 13.) In reviewing claims that evidence was obtained during an unlawful search, this Court applies "[f]ederal constitutional standards[.]" (*People v. Willis* (2002) 28 Cal.4th 22, 29.)

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42. After Reese's testimony, the court stated: "so we do have a complete record on the issue raised concerning the search and seizure, there is a case entitled People versus Burgener, which is at 41 Cal 3d. 505, specifically at page 536, and I will quote the relevant passage." It then read verbatim as follows:

> "The law enforcement purpose of the police who seek authorization from the parole agent for a warrantless search, and the parole supervision purpose of the agent who gives that authorization are indistinguishable. Nor is it relevant that the parolee may already be under arrest when the search is conducted. Neither the fact that the police seek the authorization, nor the fact that the parolee is already under arrest establishes that the parole agent's authorization is a ruse, or that there is no proper parole supervision purpose for the search. A parole agent having information sufficient to give rise to a reasonable suspicion that the parolee had violated the law is required to investigate and to place a parole hold or detainer on the parolee to preclude his release if the charge on which he has been arrested is dismissed or bail is posted. The agent clearly has a parole supervision purpose in a search undertaken to obtain evidence of a parole violation. The search was therefore reasonable within the contemplation of the Fourth Amendment."

(8 RT 1413, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 536.)

When a defendant raises a Fourth Amendment claim, he must be provided with "a full and fair opportunity to secure adjudication" of his claim. (*In re Sterling* (1965) 63 Cal.2d 486, 488; U.S. Const., 4th & 14th Amends.; see also *Stone v. Powell* (1976) 428 U.S. 465, 494, fn. 35; *Testa v. Katt* (1947) 330 U.S. 386, 389-394; *People v. Hansel* (1992) 1 Cal.4th 1211, 1219.) Under California law, section 1538.5 sets forth the "comprehensive and exclusive procedure for the final determination of search and seizure issues prior to trial." (*People v. Brooks* (1980) 26 Cal.3d 471, 475-476.)

Section 1538.5 generally requires that a motion to test the validity of a search or seizure be raised before trial. (*People v. Brooks*, *supra*, 26 Cal.3d at p. 476; *People v. Frazier* (2005) 128 Cal.App.4th 807, 828.) However, as the trial court here recognized, subdivision (h) of section 1538.5 provides an exception to that rule:

> If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial.

(§ 1538.5, subd. (h); see *People v. Jackson* (1996) 13 Cal.4th 1164, 1203 [noting the exception under section 1538.5].) At issue in this case is whether appellant was unaware "of the grounds for the motion" prior to trial.

The subdivision (h) exception does not apply if the defendant or counsel actually knew before trial of the grounds for the suppression motion, and intentionally waited until trial began before filing the motion. (See *People v. O'Connor* (1992) 8 Cal.App.4th 941, 951; *People v. Wallin* (1981) 124 Cal.App.3d 479, 484.) Nor does that exception apply if the defense should have been aware of the grounds for a suppression motion prior to trial. (*People v. Martinez* (1975) 14 Cal.3d 533, 538; see also *People v. Triggs* (1973) 8 Cal.3d 884, 887, fn. 2 [stating that a motion to suppress may be made at trial "only upon a showing of good cause why the opportunity to make the motion did

not exist prior to trial"], disapproved on another ground in *People v. Lilienthal* (1978) 22 Cal.3d 891, 896, fn. 4.)

In this case, the prosecutor did not argue or prove that appellant was *actually* aware of the grounds for the suppression motion before trial. He did not point to any evidence that appellant knew that the pistol was seized during a warrantless search.

Nor did the trial court conclude that appellant was actually aware before trial that the pistol was seized during a warrantless search. Instead, the court concluded that appellant *should have been aware* of that fact, reasoning as follows: Reese authored a report indicating that he located the pistol; that report did not mention a search warrant; and there was no discovery "indicating that the gun was taken during execution of the search warrant." Thus, the court concluded, appellant should have been aware that the pistol was taken by Reese during his search of the camper. (8 RT 1397.) [43]

The error in the court's reasoning is apparent. It failed to inquire whether Reese's report stated that his search was actually made without a warrant. The fact that Reese's report did not mention a warrant is not a sufficient basis for concluding that appellant should have been aware that Reese found the pistol during a warrantless search.

Nor did the court address whether the discovery provided to appellant caused confusion, as appellant averred. Discovery from the prosecution may

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43. The court's conclusion -- that appellant was not actually aware before trial of the grounds for the motion, but should have been -- is implicit in its statement that appellant's in propria persona status was not an excuse for being unaware of the basis for the motion: "If I were to allow this motion to be heard at this time, it would be granting favoritism to an individual who decided to represent himself." (8 RT 1397.) The court logically would not have made that statement if it believed that appellant actually was aware before trial of the grounds for suppression.

mislead a defendant about possible grounds for a suppression motion. (See, e.g., *People v. Guzman* (1975) 47 Cal.App.3d 380, 390-391; *United States v. Carson* (10th Cir. 1985) 762 F.2d 833, 835.) Here, although appellant argued that he had been confused by the discovery, the trial court did not review the relevant documents to determine whether appellant's confusion or misapprehension was reasonable or sufficed to establish the exception under section 1538.5, subdivision (h).

Further, the court erred in not considering appellant's "pro per" status in determining whether he should have been aware of the grounds for the motion before trial. It is true that the right of self-representation is not "a license not to comply with relevant rules of procedural and substantive law." (*Faretta v. California* (1975) 422 U.S. 806, 834, fn. 46.) But "[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims." (*Hughes v. Rowe* (1980) 449 U.S. 5, 15; see also *id.* at pp. 9-10; *Christensen v. C.I.R.* (9th Cir. 1986) 786 F.2d 1382, 1384-1385; *Traguth v. Zuck* (2d Cir. 1983) 710 F.2d 90, 95.) Where the issue before a court involves, as here, whether a self-represented defendant should have been aware of the existence of certain documents (here, the warrant and the return), and whether he should have been aware that those documents suggested that his Fourth Amendment rights had been violated by the state, the court cannot make a fair determination without taking into account the defendant's status.

The court erred in concluding that the section 1538.5, subdivision (h) exception did not apply. As a result, appellant was denied a full and fair opportunity to litigate his claimed deprivation of his constitutional rights. (U.S. Const., 4th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 13, 15; § 1538.5, subd. (h).)

C. The Trial Court Erred in Failing to Suppress the Evidence and Testimony That Resulted from the Unlawful Search of Appellant's Home

The trial court did not simply rule that the motion was untimely. It also appears to have addressed the merits -- i.e., the prosecution's contention that the search was permissible as a parole search (8 RT 1390) -- when it read an excerpt from this Court's opinion in *People v. Burgener* (1986) 41 Cal.3d 505, relating to parole searches. (8 RT 1413.)

In ruling on the merits of a motion to suppress, a trial court "must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated." (*People v. Hoyos* (2007) 41 Cal.4th 872, 891; see also *People v. Leyba* (1981) 29 Cal.3d 591, 596-597; *People v. Lawler* (1973) 9 Cal.3d 156, 160.) Here, the court failed to follow these steps. It took no evidence regarding whether appellant was on parole, whether any search conditions applied as a result of parole, whether any such conditions were valid, or whether the search was actually a "parole search." In the absence of such evidence, any purported selection of a rule of law, such as reading an excerpt from this Court's opinion in *People v. Burgener*, *supra*, 41 Cal.3d 505, is simply not the juridical equivalent of selecting the rule of law and applying it to facts established by evidence.

By immediately objecting and moving to strike Reese's testimony, and by arguing that Reese searched his home without a warrant (8 RT 1389-1395), appellant met his burden of "set[ting] forth the factual and legal bases for the [suppression] motion by making a prima facie showing that law enforcement authorities acted without a warrant." (*People v. Johnson* (2006) 38 Cal.4th 717, 723, citing *People v. Williams* (1999) 20 Cal.4th 119, 129.) "[A] warrantless search of [a private residence] is unreasonable per se unless it falls within a

recognized exception to the warrant requirement . . . ." (*People v. Robles* (2000) 23 Cal.4th 789, 795; see also *Georgia v. Randolph* (2006) 547 U.S. 103, 109.) [44] The warrantless search of appellant's home and the seizure of the pistol therefrom violated the state and federal constitutions. (U.S. Const., 4th & 14th Amends.; Cal. Const., art. I, §§ 7, 13 & 15.)

Evidence obtained in violation of the Fourth Amendment may not be introduced at trial for the purpose of proving the defendant's guilt. (*Mapp v. Ohio*, *supra*, 367 U.S. at pp. 654-655.) This exclusionary rule extends to "primary evidence obtained as a direct result of an illegal search or seizure . . . ." (*Segura v. United States* (1984) 468 U.S. 796, 804.) In this case, the primary evidence obtained from the illegal search of appellant's home was Reese's testimony regarding the search and the pistol. Therefore, the trial court erred in failing to exclude that evidence.

The exclusionary rule also extends to "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree'" (*Segura v. United States*, *supra*, 468 U.S. at p. 804, quoting *Nardone v. United States* (1939) 308 U.S. 338, 341), including a confession that is the fruit of an unlawful arrest or search (see *Kaupp v. Texas* (2003) 538 U.S. 626, 633; *Brown v. Illinois* (1975) 422 U.S. 590, 603; *United States v. Davis* (9th Cir. 2003) 332 F.3d 1163, 1170-1171).

In this case, appellant's confession was derivative of the illegal search of his home. At the June 14 interrogation, the interrogators confronted appellant with the illegally seized evidence in an effort to secure a confession: "We got the gun in custody, we just take the bullet out of the post today.

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44. There is no doubt that the Fourth Amendment, including the exclusionary rule, "applies in a criminal proceeding where a parole officer obtains evidence during an unconstitutional search." (*People v. Willis*, *supra*, 28 Cal.4th at p. 41; see also *Samson v. California* (2006) 547 U.S. 843, 848.)

We're going to compare the bullets. So it's not, uh, uh so that is the easy part of the job now." (1 CT 317.) Appellant confessed minutes later. (1 CT 321-342.) Thus, the interrogators exploited the unlawful search to induce appellant's confession: "'Confronting a suspect with illegally seized evidence tends to induce a confession by demonstrating the futility of remaining silent.'" (6 LaFave, Search and Seizure (4th ed. 2004) § 11.4(c), p. 307, quoting *People v. Robbins* (Ill.App. 1977) 369 N.E.2d 577, 581.) Given the direct link between the search and the confession, and the lack of any circumstance attenuating that link, appellant's confession should have been suppressed as fruit of the unlawful search of his home.

D. This Court Should Either Remand the Cause for a New Suppression Hearing or Reverse the Entire Judgment

If this Court concludes that the trial court denied the motion solely on a procedural ground, the cause should be remanded for a new suppression hearing. Where a trial court denies a motion to suppress without reaching the merits, a remand for a new suppression hearing is the appropriate remedy. (See, e.g., *People v. Dachino* (2003) 111 Cal.App.4th 1429, 1433-1434; *People v. Smith* (2002) 95 Cal.App.4th 283, 304-306.) Even where the trial court has reached the merits, moreover, an intervening change in the law may require a remand for a new suppression hearing. (See P*eople v. Moore* (2006) 39 Cal.4th 168, 174-178; § 1260.)

If this Court concludes that the trial court also addressed the merits, then reversal of the entire judgment is required. A trial court's erroneous failure to exclude challenged testimony and suppress evidence requires reversal of the judgment unless the state proves beyond a reasonable doubt that the error did not contribute to the verdict. (*Chambers v. Maroney* (1970) 399 U.S. 42, 52-53; *Bumper v. North Carolina* (1968) 391 U.S. 543, 550; *Chapman v. California* (1968) 386 U.S. 18, 23-24; *People v. Prince* (2007) 40 Cal.4th 1179, 1250.)

Here, the pistol and its discovery in appellant's home were indisputably important elements of the prosecution's guilt phase case. (E.g., 8 RT 1308, 1312; 10 RT 1997, 2001, 2003.) In *Bumper v. North Carolina*, *supra*, 391 U.S. 543, where the high court concluded that the seizure of a rifle used during the crime violated the Fourth Amendment (*id.* at p. 550), the Court discussed whether the error required reversal and concluded:

> Because the rifle was plainly damaging evidence against the petitioner with respect to all three of the charges against him, its admission at the trial was not harmless error.

(*Ibid.*) The same is true here: because the pistol was an instrument of the crime and "plainly damaging evidence" against appellant, the error was not harmless.

Furthermore, the statements appellant made during interrogation -- which were inadmissible as fruits of the unlawful search of appellant's home -- were central to the prosecution's case at guilt. In his guilt-phase opening statement, the prosecutor characterized the statements as a "confession" to murder and attempted robbery. (8 RT 1301-1304, 1308-1312.) He played the audiotape of the interrogations at trial (8 RT 1415, Exhs. 18-19; 4 CT 1198-1241); and he invoked those statements numerous times in his guilt-phase opening argument (10 RT 1999, 2002, 2004-2005) and in his final argument (10 RT 2039-2042, 2044-2046, 2049; see also Arg. 3, *ante*).

The error was also prejudicial at the penalty phase. The jury was instructed at penalty to consider the evidence from the entire trial (16 RT 3079, 3090, 3100), which included the statements made during appellant's interrogation. In his penalty-phase opening statement, the prosecutor reminded the jury of the June 14 interrogation, and promised to play portions of the audiotape "to emphasize the circumstances of the crime, reemphasize it during this penalty phase." (14 RT 2559.) He subsequently did so by having Investigator Steen testify to a number of the more damaging statements

appellant made. (14 RT 2577-2581.) The confession was also referred to in the prosecutor's closing argument to the jury at the penalty phase. (16 RT 3115-3117, 3131, 3133.)

The state cannot prove beyond a reasonable doubt that the error did not contribute to the guilt verdict, the special circumstance finding, and the penalty verdict. Accordingly, the entire judgment must be reversed.

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5. THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO OBTAIN EVIDENCE AND TO PRESENT THAT EVIDENCE AT TRIAL WHEN IT REFUSED TO REQUIRE A REPORTER WHO TESTIFIED AT GUILT AND PENALTY TO DISCLOSE THE NOTES OF HER JAILHOUSE INTERVIEW OF APPELLANT, OR, IN THE ALTERNATIVE, TO STRIKE HER ENTIRE TESTIMONY

This case presents the issue of whether a reporter who has testified for the prosecution that a murder suspect confessed to the crime during a jailhouse interview has a right to refuse to disclose her notes of that interview; and whether a defendant's right to confront and cross-examine that witness requires that her entire testimony be stricken if those notes are not disclosed.

A. Factual Background

Appellant was arrested at 5:00 p.m. on Friday, June 14, interrogated at the Orange County Jail until 9:00 p.m., and booked that evening. (Accuracy Supp. CT 13-14; 1 CT 295, 342.) At 11:00 p.m., an unidentified editor for the Orange County Register newspaper left a message with one of its reporters, Marla Jo Fisher, to interview appellant at the jail. (3 RT 339.)

Early the next morning, Fisher went to the jail and asked to see appellant. (3 RT 342-343.) Appellant was brought to a glass-enclosed interview area where, according to Fisher, she identified herself as a reporter over the telephone, and appellant agreed to be interviewed. (3 RT 347-348.) According to appellant, "On the other side of the glass was an unknown adult female, in civilian clothes, who began questioning me about the slaying at the Home Base." (2 CT 546.)

The following day, the Register published an article by Fisher, the lead to which stated: "A Garden Grove man on Saturday admitted to shooting a HomeBase [*sic*] customer-service manager to death, saying he tried to rob the store because he wanted to go back to prison forever." The article contained numerous highly-damaging admissions relating to the crime and purportedly

made by appellant during the interview. (2 CT 521-523.)

The prosecution included Fisher on its witness list and subpoenaed her to testify. (1 CT 378; 2 CT 514.) In turn, the defense served a subpoena on the Register for the production of Fisher's notes. (2 CT 503, 516-517.) On September 5, 1997, after the Register produced only the published article of Fisher's interview with appellant, the trial court informed appellant and the prosecutor that an order to show cause should be issued as to why the "unpublished version" of the article -- i.e., Fisher's notes of the interview -- should not be produced. (1 RT 205-207.)

On October 14, 1997, the Register, on its own behalf and on behalf of Fisher, filed a motion for a protective order limiting the scope of the subpoenas to information "not protected under the reporter's shield law . . . and the First Amendment[.]" [45] (2 CT 501-502.) They did not object to Fisher testifying for the prosecution, so long as long as her testimony was limited to verifying the accuracy of the statements that were attributed to appellant in the article. But they objected to any cross-examination into matters "beyond those already published," and specifically to "any line of questioning that seeks to elicit Fisher's recollection of the circumstances surrounding her interview of defendant or the contents of Fisher's notes, except to the extent such information was published." (2 CT 503-504.)

At a hearing on that date, appellant argued that the protective order would violate his Sixth Amendment rights (2 RT 312-313), and that he had "no way of impeaching that article without cross-examining her and seeing her notes, none." (2 RT 318.) The court decided to give appellant time to file an

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45. The shield law is discussed *post* and "protects a newsperson from being adjudged in contempt for refusing to disclose either: (1) unpublished information, or (2) the source of information, whether published or unpublished." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 796-797.)

opposition to the Register's motion. (2 RT 320.)

On October 20, 1997, appellant filed an opposition and a declaration in which he averred that the reporter's notes were material to his defense in several ways, including:

> To impeach the reporter's credibility: "I contend journalistic license was taken, in publishing statements out of context in the June 16, 1996 article. I contend I have been misquoted in various passages";
>
> To establish mitigation: "Many statements I made during the interview, including those regarding the victim will establish mitigating circumstances relative to the penalty determination";
>
> To attack the special circumstance: "Many statements may establish a lesser offense, in that the slaying was not in furtherance of a robbery"; and
>
> To establish that the reporter was acting at the direction of the police: "On information and belief I contend there is evidence the Government invited Marla Jo Fisher into the detention facility to interview me."

(2 CT 548-549.)

On that date, the trial court held a hearing and directed a "threshold question" to counsel for the Register: "[A]re there any records, reports and media coverage that's not already been disclosed?" Counsel refused to answer that question, stating that "even saying whether notes do or don't exist could run afoul of the shield law." (3 RT 327-328.) The court did not require counsel to answer the question.

After reviewing the factors set forth in this Court's opinion in *Delaney v. Superior Court* (1990) 50 Cal.3d 785, regarding the standard for determining when a defendant may compel disclosure of information under the newsperson's shield law, the trial court concluded that appellant's interests outweighed the newspaper's. (3 RT 328-330.) The court concluded, inter alia, that the unpublished information was neither confidential nor sensitive, given

that it was "derived" from appellant (3 RT 328-239), and that the importance of the information to appellant in cross-examining the reporter on his putative admissions was "rather self-evident." (3 RT 329.) It ruled that appellant would be allowed "to cross-examine the [reporter] concerning all of the circumstances surrounding this interview, including any statements that he may have made that were not published." But it refused to make a pretrial order requiring production of the reporter's notes: "It will depend on what the testimony is, whether or not the witness has relied on those notes in refreshing her recollection in testifying." (3 RT 334-335.)

With regard to whether Fisher was acting as an "agent" of the police, she was summoned and testified that, as far as she was aware, there was no police involvement in setting up the interview. (3 RT 335-350.) When Fisher could not remember why the interview had been abruptly terminated, appellant asked, "Would it be in your notes?" Fisher replied, "Unlikely." (3 RT 343-344.) Appellant then asked whether her notes were limited to appellant's statements, and Fisher responded:

> Generally in a situation like that one where it's not my regular beat and I'm just sent out to do an interview, my notes generally only reflect the comments of the interviewee in order to get the quotes correct.

(3 RT 334.) Following Fisher's testimony, the court concluded that, "absent further offers of proof or representations that there is some sort of police agency activity, it would appear that that line of inquiry is irrelevant." (3 RT 350-351.)

In his guilt-phase opening statement, the prosecutor informed the jury that appellant had been interviewed by a reporter and "confesse[d] to the attempted robbery and murder" of the victim. (8 RT 1310-1311.)

Before Fisher testified at the guilt phase, the court held a hearing outside the presence of the jury to determine "whether or not she used

anything to refresh her recollection." (8 RT 1433.) The prosecutor first asked Fisher whether she had taken any notes during her interview of appellant. As at the earlier hearing, counsel for the Register objected "that the question calls for information that's protected from disclosure by the reporter shield law and the First Amendment reporter's privilege." When the court asked whether Fisher was refusing to answer the question, she consulted with counsel, then refused to answer the question. She did testify, however, that she had only reviewed the newspaper article and "a videotape of a television interview" before appearing in court. (8 RT 1434-1436.)

Appellant renewed his request "to see the notes." (8 RT 1436.) He also argued that "if she reads anything that's in quotations, I'm assuming that she's going to say that's verbatim, and I'm assuming that those were written down as notes, and we are getting back to the note[s] issue." (8 RT 1443.) When counsel for the Register asked about the court's ruling on the notes, the court reiterated that, so long as the reporter had not used them to refresh her recollection, "then I don't see that they can legitimately or legally be produced under the shield law." (8 RT 1444.) Appellant complained that he had "no way of testing her credibility without the notes." The court responded, "Well, considering the interview was of you, I think there is significant areas of testing the credibility available to you." (8 RT 1444.) Counsel for the Register was still unclear as to the court's ruling:

> [A]re we operating then under the assumption for the purposes of today's proceedings that the scope of the inquiry is going to be limited to published materials, or are you also going to be permitting Mr. Frederickson to probe Fisher about unpublished information to the extent that it is within her recollection?

(8 RT 1445.) The court replied, "No. The court's ruling is that Mr. Frederickson may inquire about matters that were discussed during his interview with her." Counsel then inquired: "But this isn't free rein for Mr. Frederickson to inquire into unpublished matters, go beyond the scope of her

interview with him," and the court replied: "I don't see how legally I can -- well, if she claims a privilege, she claims a privilege." (8 RT 1445.)

Before the jury, on direct examination, Fisher testified that she was sent to interview appellant at the jail by an editor, spoke to appellant over a telephone with no one else present, and identified herself as a reporter. Appellant told her that he entered the Home Base store intending to commit a robbery, waited until he saw the manager going to the safe, then approached and demanded money. He told her that when the manager slammed the safe shut, appellant shot him out of frustration; and that, while he admired the victim's courage, he thought it foolish to defy the request for money. (8 RT 1449-1452, 1453-1456.) Appellant said that he called the store after the incident and told the officer that he "blamed the Home Base management for failing to train their managers to immediately hand over money, rather than risking their lives in a robbery attempt." (8 RT 1453.) On cross-examination, Fisher admitted having published "four or five corrections" as a reporter. (8 RT 1457.) Although she "would not work for the police," she might accept their offer to interview someone at the jail. (8 RT 1458-1459.)

In response to a number of questions on both direct and cross-examination, Fisher was either unsure or testified to a lack of recall. She could not recall which editor assigned her to interview appellant (8 RT 1457), what time she arrived at the jail (8 RT 1450, 1459-1460), what appellant told her about the substance of his phone call to the store (8 RT 1453), what appellant told her "about the actual incident at the safe" (8 RT 1453), what appellant said to the manager (8 RT 1854), or whether appellant told her that he had committed a robbery as opposed to an attempted robbery (8 RT 1461). On three occasions, she was forced to use the published article to refresh her recollection. (8 RT 1454-1455, 1462-1463, 1465-1466.) Appellant queried: "The majority of your statements today are you remembering from about 18

months ago or are you remembering from the article that you've read?" Fisher replied, "I used the article to refresh my memory." (8 RT 1461-1462.) After Fisher again used the article to refresh her recollection, appellant asked: "[D]id reading the article just now truly refresh your memory that you went back 18 months and actually remembered it, or are you just now reciting by rote what you've written?" She replied, "Reading the article helped me remember." (8 RT 1463.) When appellant asked for a list of the names of her editors, she invoked the "shield law as well as the reporter's privilege." (8 RT 1463-1464.) Appellant's motion to strike her entire testimony was denied. (8 RT 1463-1464.)

During its penalty-phase case-in-chief, the prosecution recalled Fisher, who testified that appellant said that one of the reasons for the attempted robbery was because he had been raised in institutions, had spent many years in prison, did not like life on the outside, was more comfortable in prison, loved prison life, and wanted to return there. When asked by the prosecutor whether appellant showed remorse, Fisher said that he did seem sorry to have shot the victim, but thought that it was the fault of store officials for failing to teach their employees to hand over money and not argue during a robbery. (14 RT 2573-2575.) The prosecutor, in his penalty-phase closing argument, quoted Fisher's testimony at length, save for her testimony concerning appellant's apparent regret. (16 RT 3143-1344.)

B. Appellant Had a Fundamental Constitutional Right to Obtain Evidence and to Present That Evidence at Trial

A person accused of a crime has a fundamental right under both the state and federal constitutions to a fair trial. (See *Delaney v. Superior Court*, *supra*, at pp. 805-806 & fn. 18; see also Cal. Const., art. I, §§ 15 & 28; § 686, subd. 3; *In re Martin* (1987) 44 Cal.3d 1, 29-30.) "Fundamental fairness in an adversarial system requires that the defense be given the tools with which it can obtain existing evidence that challenges the prosecution case, either by

tending to establish affirmatively the defendant's innocence or by simply casting doubt upon the persuasiveness of the prosecution's evidence." (6 LaFave & Israel, Criminal Procedure (3d ed. 2007) § 24.3(a), p. 340.) Accordingly, included in the right to a fair trial is a "constitutionally guaranteed access to evidence" (*California v. Trombetta* (1984) 467 U.S. 479, 485; see also *United States v. Nixon* (1974) 418 U.S. 683, 709-711), and the right to compulsory process to obtain evidence (*Washington v. Texas* (1967) 388 U.S. 14, 17-19; *Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 808).

Having obtained that evidence, the right to a fair trial means that the accused is entitled to present it to the jury: the state and federal constitutions guarantee "'a meaningful opportunity to present a complete defense'" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324), which means, at a minimum, "the right to put before a jury evidence that might influence the determination of guilt" (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56), and the right to rebut or attack the prosecution's evidence by confronting and cross-examining its witnesses (*Davis v. Alaska* (1974) 415 U.S. 308, 315; *Douglas v. Alabama* (1965) 380 U.S. 415, 418-420; *Pointer v. Texas* (1965) 380 U.S. 400, 404).

In this case, the prosecution obtained the reporter's testimony by subpoena. Fisher testified at guilt and penalty that, inter alia, appellant made numerous statements confessing to the crime. The defense, in turn, sought evidence from that reporter that might cast doubt on her testimony: the notes of her interview with appellant and testimony concerning those notes.

Absent a valid privilege, all citizens -- including a reporter -- have an obligation "to give relevant testimony with respect to criminal conduct." (*Branzburg v. Hayes* (1972) 408 U.S. 665, 724 (conc. opn. of Powell, J.); see also *id.* at pp. 684-687; Evid. Code, § 911 ["Except as otherwise provided by statute . . . (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing"].) In this case, the

Register and Fisher claimed that Fisher's notes and testimony about those notes were protected from disclosure under the First Amendment of the federal Constitution; and article I, section 2, subdivision (b) of the California Constitution, the so-called "shield law." (2 CT 504-510.) For the reasons that follow, that evidence was not protected from disclosure under either federal or state law.

C. Neither the First Amendment Nor the Shield Law Protected the Reporter from Disclosing and Testifying about Her Notes

1. The First Amendment Did Not Protect the Reporter from Disclosing and Testifying about Her Notes

With regard to the First Amendment, the Register and Fisher argued that in *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, this Court "explicitly recognized an independent right under the First Amendment to refuse to disclose unpublished information, even where such disclosure is ordered by" a lower court. (2 CT 508.) In fact, however, *Mitchell* recognized only a "qualified privilege" in a civil case. (*Id.* at p. 279.) In a criminal case, the *Mitchell* Court was careful to note, "both the interest of the state in law enforcement . . . and the interest of the defendant in discovering exonerating evidence outweigh any interest asserted in ordinary civil litigation." (*Ibid.*)

Similarly, in *Delaney v. Superior Court*, *supra*, 50 Cal.3d 785, this Court observed that at least a plurality of the high court has concluded that the First Amendment "*does not provide newspersons with even a qualified privilege* against appearing before a grand jury and being compelled to answer questions as to either the identity of news sources or information received from those sources." (*Id.* at p. 795, emphasis added, discussing *Branzburg v. Hayes*, *supra*, 408 U.S. 665.) The United States Supreme Court has not revisited the issue since its decision in *Branzburg*. (*In re Grand Jury Subpoena, Judith Miller* (D.C.Cir. 2006) 438 F.3d 1141, 1147.) Moreover, since this Court's decision in *Delaney*,

little has changed concerning the scope of First Amendment protection of reporters, particularly as regards nonconfidential information. (See generally Note, *The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media* (2005) 37 Conn. L.Rev. 1235.)

In fact, as the trial court here correctly observed, "the California shield law is much more restrictive than the First Amendment privilege under the federal line of authority." (3 RT 325; see *Miller v. Superior Court* (1999) 21 Cal.4th 883, 899 [the shield law "expanded the scope of the newsperson's protection from disclosure beyond what the First Amendment provides"].) Thus, if unpublished, nonconfidential information is not protected from disclosure by the shield law, then the First Amendment will not bar its disclosure. As argued next, the information at issue here was not protected from disclosure under the shield law.

2. The Shield Law Did Not Protect the Reporter from Disclosing and Testifying about Her Notes

The shield law, article I, section 2, subdivision (b) of the California Constitution, provides an immunity from contempt for a newsperson who refuses to disclose either a "source" of information or any "unpublished information." (See *Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 796-797.) [46] In this case, there is no issue of revealing a "source" because appellant was the source. The issue was over "unpublished information": i.e., Fisher's notes of her interview of appellant.

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46. Evidence Code section 1070 provides a similar protection, but given that it is nearly identical in wording to the constitutional provision, this Court analyzes the two provisions in the same manner. (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 796, fn. 5 & p. 801, fn. 11.)

a. The Shield Law Did Not Apply Because Appellant Was Both the Source of the Unpublished Information and the Person Seeking Its Disclosure

In *People v. Sanchez* (1995) 12 Cal.4th 1, this Court noted the issue of "whether the fact that defendant himself was the source of some of the information rendered it outside the protection of the shield law." (*Id.* at p. 56, fn. 3.) This Court did not address the issue because the question was litigated below on the assumption that "the notes were unpublished information within the meaning of the shield law[.]" (*Ibid.*)

In *People v. Vasco* (2005) 131 Cal.App.4th 137, the Court of Appeal, without deciding the issue, set forth the reasons why the shield law should not apply in these circumstances:

> The shield law's purpose is to "protect a newsperson's ability to gather and report the news." Where the defendant is both the source of the reporter's information and the person requesting the disclosure, there is no risk the reporter's source (the defendant) will complain her confidence has been breached. Nor is the separate policy of safeguarding press autonomy in any way compromised. And, where the defendant is the reporter's source of information, there appears no reason to assume disclosure would hinder the reporter's ability to gather news in the future.

(*Id.* at p. 152, fn. 3, internal citations omitted.)

In this case, appellant argued to the trial court that:

> [T]he need for the reporters [*sic*] presumably disinterested testimony vastly outweighs any claim of immunity. The defendant himself is the source of this information sought. How can it seriously be argued that the source will feel his confidence breached? The source seeks the information. The policy of the shield law is not thwarted.

(2 CT 550.) Those arguments embrace the reasons set forth in *Vasco* as to why the shield law should not apply in these circumstances. Further, since the issue is based on "undisputed facts" -- appellant was both the source of the unpublished information and the seeker thereof -- this Court may consider the

"pure question of law" presented by those facts. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 118.)

"Because privileges prevent the admission of relevant and otherwise admissible evidence, they should be narrowly construed." (*People v. Sinohui* (2002) 28 Cal.4th 205, 212, internal quotation marks omitted.) For that reason, and for the reasons set forth in *Vasco*, this Court should conclude that the shield law simply does not apply when the defendant in a criminal case is both the source and seeker of the "unpublished" information.

b. Even Under the Shield Law, Fisher Was Required to Disclose and Testify About Her Notes

Even if the shield law does apply, and assuming that Fisher met the requirements for its coverage,[47] she was still required to disclose her notes and testify about those notes. In a criminal case, the immunity from contempt granted to newspersons by the shield law "must yield to [an accused's] constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right." (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 793; see also *id.* at pp. 805-806.)

When a reporter asserts protection under the shield law, the accused must make a threshold showing of "a reasonable *possibility* the information will

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47. A reporter claiming protection under the shield law must show that:

> he is one of the types of persons enumerated in the law, that the information was "obtained or prepared in gathering, receiving or processing of information for communication to the public," and that the information has not been "disseminated to the public by the person from whom disclosure is sought." (Art. I, § 2(b).)

(*Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 805, fn. 17.) Here, Fisher averred in her declaration submitted with the motion for a protective order, and she testified, that she was acting as a reporter and gained information from appellant for communication to the public. (2 CT 498-499; 3 RT 338-339.)

materially assist his defense." (*Id.* at p. 808, emphasis added.) The showing "need not be detailed or specific," so long as it rests upon "more than mere speculation." (*Id.* at p. 809.)

This Court's adoption of the reasonable-possibility standard reflects a commonsense understanding that a defendant seeking unpublished information from a reporter -- typically her notes -- cannot know in advance the precise content of those notes. As Chief Justice Gibson observed for a unanimous Court in *People v. Chapman* (1959) 52 Cal.2d 95 in an analogous context:

> a requirement of proof of a conflict between the witness' testimony and his earlier statement, would, in many cases, deny the accused the benefit of relevant and material evidence. Ordinarily a defendant cannot show that a statement contains contradictory matters until he has seen it, and, if such a showing were a condition precedent to production, his rights would be dependent upon the highly fortuitous circumstance of his detailed knowledge as to the contents of the statement.

(*Id.* at p. 98.)

The reasonable-possibility standard is also sensitive to the constitutional interests at stake: when a reporter testifies for the prosecution regarding purported admissions made by the defendant, the defendant's need to cross-examine the witness -- "'to test the credibility, knowledge and recollection of the witness'" (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733, quoting *Sharp v. Hoffman* (1889) 79 Cal. 404, 408; see also *People v. Watson* (1956) 46 Cal.2d 818, 827) -- is compelling.

In this case, appellant met the threshold showing required by *Delaney*. In his declaration, he averred that he had "been misquoted in various passages" of the article. (2 CT 548; see also 2 CT 549, 552.) He argued, correctly, that he could not effectively cross-examine Fisher without the notes. (2 RT 205-207, 312-313, 318-319; 8 RT 1444.) Those notes were clearly relevant to test the reporter's credibility and recall. (See *Delaney v. Superior*

Court, *supra*, 50 Cal.3d at p. 809; Evid. Code, § 210 [defining "relevant evidence" as including "evidence relevant to the credibility of a witness"].)

Appellant also argued that the notes were relevant to mitigation at the penalty phase: "Many statements I made during the interview, including those regarding the victim will establish mitigating circumstances relative to the penalty determination." (2 CT 548.) The constitutional right to a fair trial includes the right to obtain and present "mitigating circumstances relevant to the penalty determination." (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 809.) The Eighth and Fourteenth Amendments require the same. (*Kansas v. Marsh* (2006) 548 U.S. 163, 175.) Further, as this Court has noted, relevant evidence at the penalty phase includes "evidence that mitigates the impact of the prosecution evidence[.]" (*In re Steele* (2004) 32 Cal.4th 682, 698.)

Here, Fisher testified at the penalty phase that appellant made several statements concerning the crime and acceptance of responsibility. The prosecution used this testimony to attack appellant's credibility at the penalty phase, and to weaken his mitigating evidence. Given Fisher's testimony, it is reasonably possible that her notes contained evidence that would have rebutted or weakened the prosecution's case for death, and assisted appellant's case for life.

The trial court *agreed* that appellant would not be able cross-examine Fisher effectively "unless he goes into matters that may or may not have been published." (3 RT 326-327.) And it correctly concluded that appellant must be allowed to cross-examine Fisher "concerning all of the circumstances surrounding this interview, including any statements that he may have made that were not published. His fundamental right to cross-examine and confront witnesses takes precedence over the shield law under the circumstances presented in this case." (3 RT 334.)

Despite the trial court's recognition in this case that appellant could not

effectively cross-examine the reporter without delving into unpublished information, the court refused to order the reporter to produce her notes:

> As far as turning over the reporter's notes, at this point I'm not going to make such an order. It will depend on what the testimony is, whether or not the witness has relied on those notes in refreshing her recollection in testifying.

(3 RT 334-335.) The court confirmed that ruling at trial, before Fisher's testimony. (8 RT 1434-1436.)

The trial court's ruling was erroneous for several reasons. First, the court failed to require the reporter to answer its threshold question: whether or not the notes existed. Counsel for the Register directed the reporter not to answer that question, arguing that the existence of the notes was itself covered by the shield law. (3 RT 327-328; 8 RT 1434-1436.) But the immunity from contempt granted by the shield law is not analogous to the Fifth Amendment privilege, where the act of production itself may be incriminating. (Compare *Fisher v. United States* (1976) 425 U.S. 391, 401.) Both article I, section 2, subdivision (b) of the California Constitution and Evidence Code section 1070 define "unpublished information" to include "notes"; neither defines "unpublished information" as including whether or not such notes exist.

The trial court could not properly exercise its discretion, as required by the shield law and an accused's constitutional right to a fair trial, without knowing (1) whether the reporter's notes existed, and (2) if so, what those notes contained. "It is not rational to ask a judge to ponder the relevance of the unknown." (*Matter of Farber* (N.J. 1978) 394 A.2d 330, 338.) The trial court need not review the notes in open court; as in other contexts where a privilege is asserted, a trial court may review the information in camera. (See *Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 813-814.) But the court must review them in order to intelligently and knowingly make the decisions required by the Constitution and by this Court in *Delaney*.

Second, as an evidentiary matter, the court was correct that the reporter would be required to produce the notes if she reviewed them before trial. (See Evid. Code, § 771.) But that is not the test required by the constitutional right to a fair trial. Under this Court's decision in *Delaney v. Superior Court*, *supra*, 50 Cal.3d 785, if there is a reasonable possibility that a reporter's notes would materially assist the defense, then those notes must be produced, irrespective of whether the reporter reviewed them in preparation for trial. (See *id.* at pp. 793, 805-806.)

Third, appellant having made the required showing of a reasonable possibility that the information sought would materially aid his defense, the court was required to order production of the notes. In *Delaney*, this Court concluded that once the accused makes the required threshold showing, the trial court must balance several factors in determining whether to order disclosure of the information: whether the unpublished information is confidential or sensitive; the interests sought to be protected by the shield law; the importance of the information to the criminal defendant; and whether there is an alternative source for the unpublished information. (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 809-813.)

In this case, these factors overwhelmingly support disclosure. The unpublished information was neither confidential nor sensitive. As this Court noted in *Delaney*:

> If, as in this case, the criminal defendant seeking disclosure is himself the source of the information, it cannot be seriously argued that the source (the defendant) will feel that his confidence has been breached.

(*Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 810-811.)

With regard to the interests at stake, Fisher testified that appellant confessed to a capital crime. The importance to appellant of fully cross-examining her on that testimony is beyond dispute. (See *Douglas v. Alabama*,

supra, 380 U.S. at p. 419; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 294-296.) On the other hand, the reporter's interest in withholding relevant, nonconfidential evidence, particularly when the defendant is the source of that evidence, was minimal. (See *Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 810-811.)

With regard to whether there was an "alternative source" for her notes, this Court's observation in *Delaney* is pertinent:

> The obvious purpose of the alternative-source requirement is to protect against unnecessary disclosure of a newsperson's confidential or sensitive information. Where the information is shown to be not confidential or sensitive, the primary basis for the requirement is not present and imposing a rigid requirement would be to sustain a rule without a reason.

(*Id.* at pp. 811-812.) [48]

There was no question here of the reporter revealing a source; nor any question of her revealing confidential information. In these circumstances, the balance weighs overwhelmingly in favor of disclosure. Therefore, the trial court erred in failing to order the reporter to produce her notes to the defense.

D. The Trial Court Erred in Failing to Grant Appellant's Motion to Strike the Reporter's Entire Testimony

At the conclusion of Fisher's guilt-phase testimony, appellant moved to strike her entire testimony. (8 RT 1463-1464.) The trial court erred in denying that motion.

"If a witness frustrates cross-examination by declining to answer some

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48. Forcing appellant to testify as to his recollection of the interview is not the same as cross-examining the witness on her contemporaneous notes, and implicates appellant's Fifth Amendment right against self-incrimination. A defendant should not be forced to surrender his Fifth Amendment right in order to assert his right to present a defense. (See *Simmons v. United States* (1968) 390 U.S. 377, 394.)

or all of the questions, the court may strike all or part of the witness's testimony." (*People v. Price* (1991) 1 Cal.4th 324, 421; see also *Fost v. Superior Court*, *supra*, 80 Cal.App.4th at p. 735.) In particular, "where the shield law is invoked to resist proper cross-examination regarding material matters, a trial court may bar the receipt in evidence of the direct testimony to which it relates or strike such testimony if it has already been given, either entirely or in part." (*Id.* at pp. 736-737.)

In this case, Fisher refused to testify concerning her notes. As a result, appellant was unable effectively to cross-examine her on her critical testimony regarding appellant's purported confession. His motion to strike was both timely and appropriate. The trial court erred in denying the motion.

E. The Trial Court's Errors Violated Appellant's State and Federal Constitutional Rights

By precluding appellant from obtaining information relevant to his defense, the trial court violated his right under the state and federal constitutions to a fair trial. (See *California v. Trombetta*, *supra*, 467 U.S. at pp. 485-486 & fn. 6; Cal. Const., art. I, §§ 15 & 28, subd. (d); *Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 805-806.) The error violated appellant's right of access to evidence (see *Trombetta*, at p. 485), his right "to develop all relevant facts" in a criminal case (*United States v. Nixon*, *supra*, 418 U.S. at p. 709; see also *id.* at p. 711), his right to present a complete defense (*Holmes v. South Carolina*, *supra*, 547 U.S. at p. 324), and his right to compulsory process (*Washington v. Texas*, *supra*, 388 U.S. at pp. 17-19).

At trial, the errors also violated appellant's rights under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, and the parallel provisions of the state Constitution, to confront and cross-examine the witnesses against him. (See *Davis v. Alaska*, *supra*, 415 U.S. at p. 315; *Douglas v. Alabama*, *supra*, 380 U.S. at pp. 418-420; Cal. Const., art. I, §§ 15 & 28, subd. (d); see also § 686.) The high court has repeatedly "emphasized

the necessity for cross-examination as a protection for defendants in criminal cases." (*Pointer v. Texas*, *supra*, 380 U.S. at p. 404.)

Moreover, the errors violated appellant's rights under the Eighth and Fourteenth Amendments. Capital sentencing jurors cannot be precluded from hearing, considering, and giving meaningful effect to any constitutionally relevant mitigating evidence. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 127 S.Ct. 1654, 1672-1675; *People v. Frye* (1998) 18 Cal.4th 894, 1015-1017.) As argued above, Fisher testified at the penalty phase that appellant made several statements concerning the crime and acceptance of responsibility; and the prosecution used this testimony to attack appellant's case for life. There is a reasonable likelihood that the erroneously excluded evidence would have rebutted or weakened the prosecution's case for death, and assisted appellant's case for life. (See *Boyde v. California* (1990) 494 U.S. 370, 380.)

The errors also violated the requirement of heightened reliability in capital cases -- including at the guilt phase -- under the state and federal constitutions. (U.S. Const., 8th & 14th Amends.; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305 (joint opn. of Stewart, Powell, and Stevens, JJ.); Cal. Const., art. I, §§ 7, 15 & 17; *People v. Cudjo* (1993) 6 Cal.4th 585, 623.) "The right to confront and to cross-examine witnesses . . . promotes reliability in criminal trials." (*Lee v. Illinois* (1986) 476 U.S. 530, 540.) Any "denial or significant diminution" of an accused's right to cross-examine the witnesses against him calls into question the "integrity of the fact-finding process . . . ." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 295, internal quotation marks omitted; see also *People v. Anderson* (1987) 43 Cal.3d 1104, 1119-1120.)

Here, by precluding appellant from obtaining evidence relevant to cross-examine a prosecution witness who testified that appellant confessed to the crime, and by infringing appellant's right fully to cross-examine that

witness, the trial court injected unreliability into the process leading to the death sentence.

F. The Trial Court's Errors Require Reversal of the Entire Judgment

Where a defendant's right to cross-examine the witnesses against him has been unconstitutionally infringed, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; *Olden v. Kentucky* (1988) 488 U.S. 227, 231-233 (per curiam); *Chapman v. California* (1967) 386 U.S. 18, 24.) The same is true of the violation of a defendant's right to compulsory process and his right to present a defense. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 691.)

Due to the trial court's errors, the content of Fisher's notes is not known. What is known is that the prosecution placed great value on Fisher's testimony. The prosecutor elicited her testimony to establish that appellant made numerous statements confessing to the crime (8 RT 1450, 1452-1456, 1460-1463); and the prosecutor used her testimony to argue that appellant "confesse[d] to the attempted robbery and murder to Marla Jo Fisher" (10 RT 2004). The effect of the errors is also known: appellant's right fully to subject Fisher's testimony to cross-examination was infringed.

Fisher's testimony was not the sole testimony regarding inculpatory statements made by appellant: appellant's confessions on June 14 and August 12 figured prominently in the prosecution's case. But appellant has argued that those confessions were inadmissible. (See Arg. 3, *ante*.) Without the confessions to law enforcement, Fisher's testimony would have been especially crucial to the prosecution's case.

But even if this Court rejects appellant's argument that the confessions to law enforcement were inadmissible, reversal of the guilt judgment would still be required. The reporter's testimony that appellant confessed to the

crime went before the jury without being subject to full cross-examination. That testimony undoubtedly "contributed" to the verdict and special circumstance finding. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The importance of her testimony is underscored by the prosecution's decision to present her testimony and to emphasize that testimony in closing argument: if her testimony were unimportant, there would have been no need to call the witness. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 444; *People v. Spencer* (1967) 66 Cal.2d 158, 169, fn. 11 ["The prosecution, at least, believed that it could materially strengthen its chances of obtaining a conviction by introducing defendant's confession in evidence"].)

At penalty, Fisher testified that appellant told her that one of the reasons for the attempted robbery was because he had spent many years in prison, did not like life on the outside, was more comfortable in prison, loved prison life, and wanted to return there. She testified that appellant "seem[ed] sorry" to have shot the victim, but blamed store officials for failing to teach their employees to hand over money and not argue during a robbery. (14 RT 2573-2575.)

In his penalty-phase closing argument, the prosecutor quoted Fisher's testimony at length, save for her statement regarding appellant's apparent remorse. He argued that her testimony was "not an aggravating factor," but instead, "will only negate or minus whatever value you attach here in sympathy or in the (k) factor." (16 RT 3143-1344.) Whether the prosecutor's distinction is correct under this state's death-penalty scheme or as a matter of Eighth Amendment jurisprudence, the effect of his argument on the lay jurors was clear: the aggravating side of the balance was not increased by Fisher's testimony, but the mitigating side was decreased. By itself, that argument demonstrates that Fisher's testimony contributed to the death judgment. But the prosecutor went on to urge the jury not to give appellant what Fisher said

he wanted: life in prison. (16 RT 3144-1345.) For those reasons, even if the errors were viewed solely as ones of state law, reversal would be required because there is at least a "reasonable possibility" that the errors affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

The state cannot prove that the error was harmless beyond a reasonable doubt at the penalty phase. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Therefore, the death judgment must be reversed.

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6. THE TRIAL COURT ERRED BOTH IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER WHERE THE INFORMATION CHARGED ONLY SECOND DEGREE MALICE MURDER IN VIOLATION OF SECTION 187, AND IN FAILING TO REQUIRE THE JURORS TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER

Count one of the information alleged that "On or about June 13, 1996, [appellant], in violation of Section 187(a) of the Penal Code (Murder), a Felony, did willfully and unlawfully and with malice aforethought murder Scott Wilson, a human being." (1 CT 68.) Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that appellant was charged exclusively with second degree malice murder in violation of section 187, not with first degree murder in violation of section 189.[49]

At the conclusion of the guilt phase of the trial, the court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 3 CT 774-775), or killed during the commission or attempted commission of robbery (CALJIC No. 8.21; 3 CT 776). The court did not instruct the jury that they had to reach a unanimous decision with regard to the theory of first degree murder. The

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49. The information also alleged a felony-murder special circumstance in connection with count one. (1 CT 68.) However, this allegation did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661, overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.)

jury found appellant "Guilty of the crime of felony, to-wit: Violation of Section 187(a) of the Penal Code of the State of California (Murder), in the First Degree, as charged in COUNT 1 of the Information." (3 CT 810.)

The trial court erred, and violated appellant's constitutional rights by instructing the jury on first degree premeditated murder and first degree felony murder because the information charged appellant only with second degree malice murder in violation of section 187. The information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder. First degree murder of any type and second degree malice murder clearly are distinct crimes. Accordingly, the trial court lacked jurisdiction to try appellant for first degree murder: "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense (*People v. Granice* (1875) 50 Cal. 447, 448-449). (See also *Greenberg v. Superior Court* (1942) 19 Cal.2d 319, 321.)

Permitting the jury to convict appellant of an uncharged crime denied appellant his rights to have the state establish proof of the crimes beyond a reasonable doubt, to trial by jury, to adequate notice of the charges, to due process, and to a reliable determination on allegations that he committed a capital offense under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the correlate provisions of the state constitution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *In re Winship* (1970) 397 U.S. 358, 361-364; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362 ["Conviction upon a charge not made would be sheer denial of due process"]; *People v. Kobrin* (1995) 11 Cal.4th 416, 422-430; *In re Hess* (1955) 45 Cal.2d 171, 174-175.)

Appellant acknowledges that this Court has repeatedly rejected this claim. (See, e.g., *People v. Geier* (2007) 41 Cal.4th 555, 591-592; *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *People v. Carpenter* (1997) 15 Cal:4th 312, 394.) However, in accordance with this Court's instructions in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant has herein identified and raised the claim in the context of the facts, and requests that the Court reconsider its prior decisions.

The trial court also erred, and violated appellant's constitutional and statutory rights by failing to require the jury to agree unanimously on whether appellant had committed a premeditated murder or a felony murder before returning a verdict finding him guilty of first degree murder. When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; §§ 1163, 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693), and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Moreover, because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Cf. *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open]; McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?* (1997) 24 Fla. St. U. L.Rev. 545, 567, fn. 107 ["The extent to which the Court might permit a death sentence to be imposed by a nonunanimous jury has never been tested, because all states with jury sentencing require a unanimous verdict"].) The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict. (See *Brown*

v. Louisiana (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 347-354.) In a capital case, there is a heightened need for reliability in the procedures leading to a conviction of a capital offense. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Therefore, jury unanimity is required in capital cases.

By failing to require the jury to agree unanimously on whether appellant had committed a premeditated murder or a felony murder before returning a verdict finding him guilty of first degree murder, the court denied appellant his rights to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, to trial by jury, to the verdict of a unanimous jury, and to a fair and reliable determination that he committed a capital offense. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has repeatedly rejected this claim. (See, e.g., *People v. Morgan* (2007) 42 Cal.4th 593, 616-617; *People v. Geier*, *supra*, 41 Cal.4th at p. 592; *People v. Benavides* (2005) 35 Cal.4th 69, 100-101; *People v. Nakahara* (2003) 30 Cal.4th 705, 712.) However, in accordance with this Court's instructions in *People v. Schmeck*, *supra*, 37 Cal.4th at pages 303-304, appellant has herein identified and raised the claim in the context of the facts, and requests that this Court reconsider its prior decisions.

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1034-1035.) Moreover, the errors were structural, thus mandating reversal of the entire judgment. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.) Even if the errors were not structural, when a jury is given instructions on a legally proper theory of guilt in conjunction with instructions on a legally improper theory of guilt, any resulting conviction must be reversed unless it can be conclusively shown by

reference to the jury verdicts that no juror relied upon the improper theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69; see also *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237-1238.) Due to the general verdict used here, that determination cannot be made in this case. Accordingly, the guilt and penalty judgments must be reversed.

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7. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY THAT AN ATTEMPTED ROBBERY IS STILL IN PROGRESS FOR PURPOSES OF A FELONY-MURDER THEORY OF FIRST DEGREE MURDER UNTIL THE PERPETRATOR HAS REACHED A PLACE OF TEMPORARY SAFETY

A. Factual Background

In count one of the information, the prosecution alleged that appellant, "in violation of Section 187(a) of the Penal Code (Murder), a Felony, did willfully and unlawfully and with malice aforethought murder Scott Wilson, a human being." (1 CT 68.) The prosecution alleged a single special circumstance -- murder in the commission of an attempted robbery (1 CT 68-69; § 190.2, subd. (a) (17) (i)) -- but did not allege a separate count of attempted robbery.

The prosecution's guilt-phase evidence showed that, once inside the store, appellant identified the store manager and followed him to the safe. As the manager opened the safe, appellant said, "Excuse me." When the manager looked up, appellant said, "Can you put that money in this box?" At some point, appellant displayed the pistol that he had been concealing. The manager looked down, picked up a stack of five-dollar bills and started counting them. He then closed the safe and, without a word, started to walk away. Appellant then approached and shot the manager, and fled from the store without the money. [50]

Appellant conceded identity (9 RT 1568-1569; 10 RT 2013-2014, 2019), but presented testimony concerning his damaged psychological state

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50. The prosecutor relied on this version of events in his opening statement (8 RT 1302-1304, 1306-1307), in his opening argument (10 RT 2001-2005), and in his closing argument (10 RT 2041-2042, 2045-2046, 2049-2050). The trial court relied on this version of events in making its determination pursuant to section 190.4, subdivision (e). (4 CT 1181-1182.)

(e.g., 9 RT 1601-1602, 1609, 1654, 1679-1680, 1692 [Testimony of Dr. Rogers]), and testimony concerning his legitimate reason for being at the Home Base store (10 RT 1840-1846 [Marilee Thompson testimony]). He also argued that the killing was not sufficiently connected with an intent to rob: "I admitted to the 187, but the fanciful part of the tale is this was done because of a robbery." (10 RT 2022.) Instead, he argued, the attempted robbery was over when the victim walked away:

> Mr. Tanizaki is telling you that the special circumstances [*sic*] incorporates or states that a murder was committed during the crime of an attempt -- during the crime of a felony. Let's just blanket it. Let's not say an attempted armed robbery. Let's not say robbery. Let's not say kidnapping or anything else. Let's just say the murder occurred during the commission of a felony. Mr. Tanizaki doesn't have a felony occurring. He doesn't.
>
> If [the prosecutor's] theory is true, Scott Wilson had closed the safe and was walking away. He was just minding his own business, okay? Now, if he didn't hear me say, "Hey, this is a robbery, give me the money," and he's just walking away continuing in his job, the job that he loves, the job he has a lot of pride in, and I shoot him because I think that he didn't hear me, there's still no felony.

(10 RT 2033-2034.)

Appellant's argument that he shot the victim simply out of "frustration" was fully supported by the prosecution's own evidence. Cashier Susan Bernal testified that when the victim was walking away from the customer service area, he was not arguing with anyone, and did not call for help or call out that a robbery was happening. (8 RT 1325-1329, 1380-1382.) In the June 14 confession that the prosecutor played for the jury, appellant stated: "I think I told the guy on the phone it was like frustration I felt or something you know. It wasn't anger. I didn't kill him because I was mad at him." (1 CT 340.) Officer Dryva testified for the prosecution that, during appellant's telephone call to the store, he asked appellant why he shot the

victim, and appellant responded: "Because I was flustrated [*sic*]. He didn't do what I told him." (8 RT 1374-1375.) Similarly, newspaper reporter Marla Jo Fisher testified for the prosecution that appellant "said that he shot Mr. Wilson out of frustration because Mr. Wilson wouldn't give him the money." (8 RT 1456.)

Pursuant to the prosecutor's request, the trial court instructed the jury on two theories of first degree murder: premeditated and deliberate murder; and attempted-robbery felony murder. (2 CT 687; 3 CT 774-776; 10 RT 1975-1977.) [51] In addition, pursuant to the prosecutor's request (2 CT 687), the jury was instructed with CALJIC No. 8.21.1, concerning when a robbery is still in progress:

> For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time. ¶ An attempted robbery is still in progress after the attempted taking of the property and while the perpetrator is fleeing in an attempt to escape. Likewise it is still in progress so long as immediate pursuers are attempting to capture the perpetrator. An attempted robbery is complete when the perpetrator has eluded any pursuers, and has reached a place of temporary safety.

(3 CT 790; 10 RT 1981.) [52]

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51. The jury was also instructed on the law concerning robbery and attempt. (3 CT 783-789; 10 RT 1979-1981.)

52. CALJIC No. 8.21.1 was submitted by the prosecution. (2 CT 687.) At an initial instructional hearing, the trial court observed that it "had a question on 8.21.1, whether or not there's any reason to give that." Appellant objected to the instruction, and the prosecutor withdrew it. (8 RT 1483-1484, 1492.) Several days later, at a subsequent instructional hearing, the trial court inexplicably brought up the instruction: "Then there is 8.21.1. [¶] Any objection to that?" Appellant replied, "No, Sir." (9 RT 1579.)

Although appellant failed to lodge a second objection, the issue may be raised on appeal. Section 1259 permits appellate review to the extent any

Footnote continued on next page . . .

In his opening argument, the prosecutor focused on the issue of whether the killing occurred during the commission of an attempted robbery. (10 RT 1995-1998, 2005.) After explaining the "felony murder rule," he argued at length that the instructions provided that an attempted robbery continued in duration until after appellant fled and reached a place of temporary safety:

> Let's go to the second rule that's important in this case. When is an attempted robbery in progress? When is it completed? That's an important rule. And the Judge already read this to you, so I'm going to do this again to highlight this rule. It says for the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or limited period of time. An attempted robbery is still in progress after the original taking of the property while the perpetrator is fleeing in attempt [*sic*] to escape.
>
> Now, this explains how far and wide this course of attempted robbery is defined. Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrator. Attempted robbery is complete when the perpetrator had eluded any pursuers and has reached a place of temporary safety.
>
> Some of you must have been wondering, wasn't the attempted robbery complete at the time that, say, the safe was closed? No. You see, an attempted robbery is complete when the perpetrator has eluded any pursuers and has reached a place of temporary safety.
>
> Mr. Frederickson didn't reach a place of temporary safety until much further past the actual murder of Scott Wilson. He alluded [*sic*] Mr. Rodriguez, drove around, got on the freeway, he said that he saw a C.H.P. officer, and then he drove to some place, and

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erroneous instruction "affected [appellant's] substantial rights." This Court has held that "[i]nstructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4.)

> arguably some place probably in the city of Anaheim. When he reached some destination where he had eluded the captors, that's when the attempted robbery, by law, is closed.
>
> So anyone killed, if he killed somebody during that period before he reached that temporary safety, place of safety, he's still liable for that first degree murder under what? The felony-murder rule.

(10 RT 1995-1996.) [53]

Following appellant's argument, set forth above, the prosecutor queried: "How can Mr. Frederickson say that this murder wasn't during the course of an attempted robbery, as you've been instructed?" (10 RT 2046-2047.) The prosecutor specifically informed the jury that "the felony murder rule does not require premeditation and deliberation" (10 RT 2048), and argued that, according to the instructions, the attempted robbery was not complete until appellant "ha[d] gone to a place of temporary safety, and that's a long ways away from Home Base." (10 RT 2048-2049.)

The jury found appellant guilty of first degree murder, without specifying the theory upon which it relied; and found true the sole special circumstance. (3 CT 808, 810.)

B. The Trial Court Erred in Instructing the Jury with CALJIC No. 8.21.1

Section 189 provides, in part, that any murder "which is committed in the perpetration of, or attempt to perpetrate" robbery "is murder of the first degree." This Court has not imposed "a strict causal or temporal relationship between the felony and the killing. (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) Instead, "what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction." (*Ibid*; see also *People v. Cavitt* (2004) 33 Cal.4th 187, 208-209; *People v. Welch* (1972) 8 Cal.3d

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53. The prosecutor followed this argument with a similar argument regarding the felony-murder special circumstance. (10 RT 1996-1998.)

106, 118; *People v. Chavez* (1951) 37 Cal.2d 656, 670.)

As with any factual issue, the question of whether the killing has occurred "in the perpetration of" an alleged felony (i.e. whether the killing and the felony are part "of one continuous transaction") is one for the jury. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 623-624; *People v. Sirigano* (1974) 42 Cal.App.3d 794, 801-802; *People v. Powell* (1974) 40 Cal.App.3d 107, 163.) *Sakarias* is instructive in this regard. In that case, during deliberations, the jury asked the trial court two questions concerning the duration of the underlying felonies for purposes of first degree felony murder. The trial court, drawing language from this Court's opinion in *People v. Mason* (1960) 54 Cal.2d 164, 169, instructed the jury that:

> "Although it is alleged that the killing in the present case occurred sometime after it is alleged the defendant entered the house, if the jury finds that the defendant committed burglary by entering the house with the intent to steal, the homicide and the burglary are parts of one continuous transaction."

(*People v. Sakarias*, *supra*, 22 Cal.4th at p. 623.) On appeal, this Court agreed with the defendant's contention that the trial court's response "erroneously removed a factual issue from the jury's consideration[.]" (*Ibid.*) This Court explained that the trial court had erred in using language from cases involving whether there was sufficient evidence to support a conviction of first degree murder:

> But to hold, as we did in these cases . . . that evidence sufficient to show a single continuous transaction justifies an instruction or conviction on felony murder, is not to hold that the judge, rather than the jury, decides whether the existence of such a single transaction and, hence, a murder in the perpetration of the felony, was proven beyond a reasonable doubt. Even where substantial evidence supports such a finding, it is for the jury to decide whether or not the murder was committed "in the perpetration of" (§ 189), or "while the defendant was engaged in. . . the commission of" (§ 190.2, subd. (a) (17)), the specified felony.

(*Id.* at p. 624.)

CALJIC No. 8.21.1 may be a proper instruction under appropriate circumstances. (E.g., *People v. Boss* (1930) 210 Cal. 245, 250-251.) However, that instruction was not appropriate where, as here, the evidence shows that the attempted robbery was over when the victim walked away. (Cf. *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299-1300 [for sentencing purposes, attempted robbery was "complete" at the point where the victim refused to hand over the money].)

In *Sakarias*, the trial court's answer to the jury's questions removed from the jury's consideration the factual issue of whether the "continuous transaction" requirement under first degree felony murder was present. In this case, CALJIC No. 8.21.1 had the same effect. That instruction directed the jury in mandatory terms that the attempted robbery was still in progress until appellant "reached a place of temporary safety." (3 CT 790; 10 RT 1981.) As the prosecutor recognized and argued, the instruction was tantamount to a directed verdict on the issue of whether the killing occurred during the commission of attempted robbery because the undisputed evidence showed that appellant fatally shot the victim long before he had reached a place of "temporary safety." The trial court therefore erred in giving that instruction to the jury. (See *People v. Sakarias*, *supra*, 22 Cal.4th at pp. 623-624.)

C. The Error Violated Appellant's State and Federal Constitutional Rights

As in *Sakarias*, the error here was of "constitutional dimension." (*People v. Sakarias*, *supra*, 22 Cal.4th at pp. 624-625.) By effectively directing a verdict on the key disputed element of the offense, i.e., whether the attempted robbery was over by the time of the fatal shooting, the instructional error violated appellant's right to due process, to trial by jury, and to proof beyond a reasonable doubt of each element of first degree murder (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; see *United States v. Gaudin*

(1995) 515 U.S. 506, 509-510; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-526; *People v. Sakarias*, *supra*, 22 Cal.4th at pp. 624-625; *People v. Kobrin* (1995) 11 Cal.4th 416, 423-428), including "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277).

The trial court's error also violated appellant's right under the Sixth and Fourteenth Amendments to the federal Constitution, and the parallel provisions of the state Constitution, to present a complete defense, including the right to accurate instructions that allow the jury to consider the defense. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Mathews v. United States* (1988) 485 U.S. 58, 63; *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 916; *People v. Lucas* (1995) 12 Cal.4th 415, 456 [right to present a defense under the state Constitution].) The instruction effectively eviscerated appellant's defense that the homicide was not in fact committed in the perpetration of an attempted robbery.

The error also violated appellant's rights under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution, which require that the procedures that lead to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) Directing a verdict on an element of the offense that leads to death eligibility is patently inconsistent with that requirement.

Further, to the extent that state law was violated, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the arbitrary withholding of a right provided by state law. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16; see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 344-347.) He also had a life

interest under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), and the parallel provisions of the state Constitution, in having the jury accurately instructed on first degree murder in a capital case.

D. The Error Requires Reversal of the Entire Judgment

Because the jury was in effect directed to find that an element of the first degree murder charge had been proven, delivery of the erroneous instruction was a "structural error" which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-282; *Rose v. Clark* (1986) 478 U.S. 570, 578.) If the error is subject to a prejudice determination, an error of this kind, which violates a defendant's fundamental constitutional rights and lightens the prosecution's burden of proof, requires reversal unless the prosecution proves that the error was harmless beyond a reasonable doubt. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Sakarias*, *supra*, 22 Cal.4th at p. 625, citing *Neder v. United States* (1999) 527 U.S. 1, 6-8.) Under that test for harmless error, the verdict of first degree murder must be reversed.

The error here directly impacted the disputed issue in the case: whether the evidence proved beyond a reasonable doubt that the killing was in the perpetration of an attempted robbery, as was required to prove first degree felony murder. As set forth above, the evidence showed, and appellant argued, that the alleged attempted robbery was abandoned and over when the manager walked away, and that appellant shot him solely out of frustration, not as part of an attempted robbery. (10 RT 2033-2034.)

Thus, this case is distinguishable from *Sakarias*, where this Court found a similar error to be harmless, in part because the evidence "did not include any such abandonment of intent or any similar interruption." (*People v. Sakarias*, *supra*, 22 Cal.4th at p. 626.) In *Sakarias*, the defendant and an

accomplice, with an intent to steal, broke into the victim's house when she was not home. This Court observed that:

> Although there was evidence that after entering and stealing, defendant and his coperpetrator formed the additional intent to attack the victim, there was no substantial evidence they at any point before the killing discarded or abandoned their intent to steal from her. Nor was there evidence of any other arguably significant interruption of events between the entry and the homicide; the evidence was simply that after gathering some personal property, the burglars waited for [the victim] to come home, then assaulted and killed her as she entered the house.

(*Id.* at pp. 625-626, internal citation omitted.)

Under the facts in this case, a rational juror, correctly instructed on first degree felony murder, could have and "may very well have concluded that the prosecution failed to prove" (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 741) that the felony and the killing were part of one continuous transaction. Accordingly, the instructional error cannot properly be deemed harmless: "If at the end of [an] examination [of the record] the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, when the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." (*Neder v. United States, supra,* 527 U.S. at p. 12.)

In *Sakarias*, this Court also concluded that the error was harmless because the jury had been instructed properly on three additional theories of first degree murder, and found true a valid special circumstance, from which this Court inferred that the "verdict rested on at least one correct theory[.]" (*People v. Sakarias*, *supra*, 22 Cal.4th at p. 625, internal quotation marks omitted.) In this case, however, the jury was instructed on only one additional theory of first degree murder (premeditated and deliberate murder), and the prosecutor, during his closing argument, effectively disclaimed reliance on that theory:

> [Appellant] talked about premeditation and deliberation. Just remember this, ladies and gentlemen, first-degree murder -- first-degree murder under the felony murder rule does not require premeditation and deliberation, make sure you understand that.
>
> The premeditation that he's talking about, hey, in order to find first-degree murder, that's in a different kind of murder. But for felony murder rule purposes, you don't need to have premeditation and deliberation, okay? This is all you need for first-degree murder, okay? It's murder, the intentional or unintentional or accidental killing, it's unlawful killing, during the attempted commission of a robbery, okay? That's first-degree murder. You don't have to premeditate it. You don't have to deliberate it. You don't have to plan for it.

(10 RT 2048.)

Thus, not only is it impossible to determine whether the jury unanimously rested its verdict on a premeditated and deliberate theory of first degree murder, it is highly likely that they did not do so. Instead, the jury likely based its verdict on the theory of first degree felony murder urged by the prosecutor at argument and effectively required by CALJIC No. 8.21.1: that the attempted robbery was not over until long after appellant shot the victim and left the store. The prosecutor could hardly have been more explicit:

> If it happens during the commission or attempted commission of a robbery, it's first-degree murder. So please be careful because Mr. Frederickson is using all kinds of, you know, language about, "hey, premeditation and deliberation" should not confuse you to the main issue in this case, was the killing during the course of an attempted robbery? *And we know that from this instruction that the attempted robbery does not cease until he, Mr. Frederickson, has gone to a place of temporary safety, and that's a long ways away from Home Base.*

(10 RT 2048-2049, emphasis added.)

Further, unlike in *People v. Sakarias*, *supra*, 22 Cal.4th at page 625, there is no valid special circumstance finding from which this Court may infer that the verdict rested on a correct theory: the error discussed herein also affected the lone special circumstance finding in this case, and that finding was additionally

impacted to appellant's detriment by other faulty instructions delivered to the jury. (See Arg. 8, *post.*)

The People cannot meet their burden of establishing that the instructional error "surely" did not contribute to the verdict (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279) and/or was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24). The verdict of first degree murder, as well as the ensuing death judgment, must therefore be reversed.

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8. THE TRIAL COURT'S ERRONEOUS AND UNCONSTITUTIONAL INSTRUCTIONS ON THE SOLE SPECIAL CIRCUMSTANCE ALLEGATION -- ATTEMPTED ROBBERY FELONY MURDER -- REQUIRE REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDING AND OF THE ENSUING DEATH JUDGMENT

A. Factual Background

The prosecution alleged a single special circumstance -- murder in the commission of an attempted robbery (1 CT 68-69; § 190.2, subd. (a) (17) (i)) -- but did not allege a separate count of attempted robbery. [54]

In his opening statement, and in his closing argument, appellant conceded identity. (9 RT 1568-1569; 10 RT 2013-2014, 2019.) The sole issues at trial were whether the evidence proved beyond a reasonable doubt that the killing was in the perpetration of an attempted robbery, as was required to prove first degree felony murder and the felony-murder special circumstance; and whether appellant had the specific intent to commit an attempted robbery.

The prosecution's guilt-phase evidence showed that, once inside the store, appellant identified the store manager and followed him to the safe. As the manager opened the safe, appellant said, "Excuse me." When the manager looked up, appellant said, "Can you put that money in this box?" At some point, appellant displayed the pistol that he had been concealing. The manager looked down, picked up a stack of five-dollar bills and started counting them. He then closed the safe and, without a word, started to walk away. Appellant then approached and shot the manager, and fled from the

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54. Section 190.2, subdivision (a) (17) (i) provides for death eligibility where "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" robbery.

store without the money. [55]

At the time of trial in 1997, the pattern jury instruction for the felony-murder special circumstance required the prosecution to prove:

> [1a.] [The murder was committed while [the] [a] defendant was [engaged in] [or] [was an accomplice] in the [commission] [or] [attempted commission] of a _____;] [or] [and]
>
> [1b.] [The murder was committed during the immediate flight after the [commission] [attempted commission] of a _____ [by the defendant] [to which [the] [a] defendant was an accomplice][.] [; and]
>
> [2 The murder was committed in order to carry out or advance the commission of the crime of _____ or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] was merely incidental to the commission of the murder.]

(CALJIC No. 8.81.17 (6th ed. 1996).)

At trial, the prosecution moved (2 CT 719) to modify paragraph two of CALJIC No. 8.81.17 by deleting the requirement that "[t]he murder was committed in order to carry out or advance the commission of the" felony. It also sought to narrow the "merely incidental" sentence by adding the phrase: "A robbery is merely incidental to a murder where there is no purpose for the commission of the attempted robbery that is independent of the murder." (2 CT 728.) Appellant filed a brief in which he opposed the prosecution's proposed modifications and requested the unmodified version of CALJIC No. 8.81.17. (2 CT 729-734.)

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55. The prosecutor relied on this version of events in his opening statement (8 RT 1302-1304, 1306-1307), in his opening argument (10 RT 2001-2005), and in his closing argument (10 RT 2041-2042, 2045-2046, 2049-2050). The trial court relied on this version of events in making its determination pursuant to section 190.4, subdivision (e). (4 CT 1181-1182.)

At a hearing on the matter, the prosecutor argued that the second paragraph of CALJIC No. 8.81.17 was misleading under the facts of this case:

> [I]t leaves the impression that there is a particular mind set required by a defendant that the murder had to be intended to carry out or advance the commission of the attempted robbery. It's our position that that simply is not the law. But what the law requires is that the murder occur in the commission of an attempted robbery or immediate escape therefrom, and so that one sentence is misleading.

(10 RT 1943.) Advisory counsel Freeman responded that the law requires "an integrated transaction" (10 RT 1946), and argued that paragraph two of CALJIC No. 8.81.17 was required under the facts in the case:

> A position that the defense may argue is that, first of all, I think we all agree there has to be an integrated transaction between the felony and the slaying. No one disagrees with that proposition. I believe that's fundamental, and I think he's entitled to an instruction as to whether or not there was an integrated transaction here between the felony and the killing.
>
> He did flee. The facts of this case did show that he fled. If the trier of fact concludes that the fleeing was for the purposes enumerated under the law for the purpose of carrying out and escaping from the robbery, they can so find and draw inferences, that's an applicable. [*sic*] But I think that he is entitled to present at least a position from which the trier of fact can infer that this was not an integrated transaction, and the killing itself can be divisible from the felony.
>
> He is charged with a felony during the -- with a murder during the commission of, and I think there at least is a position that he ought to be able to argue, if he chooses to, that it was not during the commission of, but the killing itself was for an independent criminal intent. And I think there has to be a marriage of intent under the charge, because that's what he's charged with, Judge.

(10 RT 1947-1948.)

Appellant himself also argued against the prosecutor's proposed modification of the pattern instruction:

> [T]he prosecution is only stating this was an attempt robbery and

> not a committed robbery, so it couldn't have been murder during the commission of a robbery because the attempt robbery was over with, otherwise the victim would not have retained the funds that he had available to him at the time that he was murdered.

(10 RT 1949.)

The trial court decided that it could "take care of both concerns" by modifying paragraph two of CALJIC No. 8.81.17 to read that "[the] murder was committed in the course of the commission of the crime of attempted robbery or to facilitate the escape therefrom or to avoid detection," followed by the "merely incidental" sentence. The prosecution agreed to the modification. The defense did not. (10 RT 1948-1949.)

At the conclusion of the guilt phase, the jury was instructed on the felony-murder special circumstance in accordance with the court's ruling. The written version of the instruction provided to the jury read as follows:

> To find that the special circumstance, referred to in these instructions as murder in the commission of attempted robbery, is true, it must be proved:
>
> [1. The murder was committed while [the] defendant was [engaged in] in [*sic*] the [attempted commission] of a robbery;] [or]
>
> The murder was committed during the immediate flight after the [attempted commission] of a robbery [by the defendant] and]
>
> [2. the murder was committed in the course of the commission of the crime of attempted robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] robbery was merely incidental to the commission of the murder.]

(3 CT 782, brackets in original; see 10 RT 1961, 1978-1979 [oral instruction].)

In his opening and closing arguments, the prosecutor focused on the issue of whether the killing occurred during the commission of an attempted robbery. (10 RT 1995-1998, 2005; 2046-2047, 2048-2050.) After explaining

the "felony murder rule," he argued at length that the instructions provided that an attempted robbery continued in duration until after appellant fled and reached a place of temporary safety:

> Let's go to the second rule that's important in this case. When is an attempted robbery in progress? When is it completed? That's an important rule. And the Judge already read this to you, so I'm going to do this again to highlight this rule. It says for the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or limited period of time. An attempted robbery is still in progress after the original taking of the property while the perpetrator is fleeing in attempt [*sic*] to escape.
>
> Now, this explains how far and wide this course of attempted robbery is defined. Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrator. Attempted robbery is complete when the perpetrator had eluded any pursuers and has reached a place of temporary safety.
>
> Some of you must have been wondering, wasn't the attempted robbery complete at the time that, say, the safe was closed? No. You see, an attempted robbery is complete when the perpetrator has eluded any pursuers and has reached a place of temporary safety.
>
> Mr. Frederickson didn't reach a place of temporary safety until much further past the actual murder of Scott Wilson. He alluded [*sic*] Mr. Rodriguez, drove around, got on the freeway, he said that he saw a C.H.P. officer, and then he drove to some place, and arguably some place probably in the city of Anaheim. When he reached some destination where he had eluded the captors, that's when the attempted robbery, by law, is closed.
>
> So anyone killed, if he killed somebody during that period before he reached that temporary safety, place of safety, he's still liable for that first degree murder under what? The felony-murder rule.

(10 RT 1995-1996.)

The prosecutor followed this argument with an argument directed specifically to the felony-murder special circumstance:

Now, there is also this principle about the felony-murder rule and when the course or progress of an attempted robbery is completed. It is further explained in the finding of the special circumstances. So when you look at the special circumstances, and you have to answer was Scott Wilson's death during the course of an attempted robbery, if you say yes, it was, based on the law and the facts in this case, then under the special circumstances, you will say true.

By law and by the facts, was Scott Wilson killed during the course of the attempted robbery? Again, I think it's very, very clear based on the evidence. There is no question that Scott Wilson was killed, by law, by the facts, during the course and progress of the attempted robbery. And if you do find that under the special circumstances, you mark that as true. I think hopefully this explanation will give you kind of an insight into the law.

I will give you an example where a special circumstance would not apply, okay, in a fact pattern, a hypothetical fact pattern.

Let's say that Mr. Frederickson had a personal relationship with Scott Wilson of some sort. Let's say they were friends. And Mr. Frederickson knew Scott Wilson, didn't like him, decided to go into Home Base for the purpose of killing him based on this prior relationship. He didn't like him. So he decides, I'm going to go into that Home Base and kill Scott Wilson, he goes in there, okay, for the purpose, with a gun, to kill Scott Wilson. He goes in there, makes contact with Scott Wilson, shoots him, kills him, and then in the course of that murder decides, you know what? I think I'm going to take his personal property. So he tries to take his wallet. Well, that's not a special circumstance murder here. That's not, because what that is is the attempted robbery now is merely incidental to the murder, because it was murder on his mind, he went in there, killed somebody, and then as an afterthought decides I'm going to try to take this guy's property. That's what the law says here in terms of another jury instruction that says hey, you can't have a special circumstance when it's incidental, when the attempted robbery is incidental to the murder.

But at the forefront of this case is the attempted robbery. That's why it's true in this case in terms of the special circumstance, because what Mr. Frederickson did was in the course of an attempted robbery. So I want to make sure you understood that.

(10 RT 1996-1998.)

In his closing argument, appellant did not concede the special circumstance issue:

> [The prosecutor] is telling you that the special circumstance[ ] incorporates or states that a murder was committed during the crime of an attempt -- during the crime of a felony. . . . [He] doesn't have a felony occurring. He doesn't.
>
> If his theory is true, Scott Wilson had closed the safe and was walking away. He was just minding his own business, okay? Now, if he didn't hear me say, "Hey, this is a robbery, give me the money," and he's just walking away continuing in his job, the job that he loves, the job he has a lot of pride in, and I shoot him because I think that he didn't hear me, there's still no felony. There isn't, you know. You need to -- you know, you need to look at all of that.

(10 RT 2033-2034.)

The jury found appellant guilty of first degree murder, without specifying the theory upon which it relied; and found true the sole special circumstance allegation. (3 CT 808, 810.)

B. Several Instructions Relating to the Attempted Robbery Felony-Murder Special Circumstance Were Erroneous

1. The Trial Court Erred When It Deleted the "Carry Out or Advance" Language from CALJIC No. 8.81.17

The second paragraph of CALJIC No. 8.81.17 is derived from this Court's decision in *People v. Green* (1980) 27 Cal.3d 1, 59-62, which addressed the meaning of the phrase "during the commission" under the then-current version of section 190.2. This Court concluded that the felony-murder special circumstance could be applied to a person "who killed in cold blood in order to advance an independent felonious purpose" (*id.* at p. 61), but was not applicable where "the defendant intended to commit murder and only incidentally committed one of the specified felonies while doing so." (*People v. Clark* (1990) 50 Cal.3d 583, 608; see also *People v. Thompson* (1980) 27 Cal.3d

303, 322-325.) Subsequent to the *Green* decision, the Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, revised CALJIC No. 8.81.17 by adding the second paragraph (*People v. Gates* (1987) 43 Cal.3d 1168, 1193), the paragraph that the prosecutor in this case successfully sought to modify.

In *People v. Weidert* (1985) 39 Cal.3d 836, this Court, relying on *Green*, affirmed that "where an accused's primary goal was not to kidnap but to kill, and where a kidnapping was merely incidental to a murder *but not committed to advance an independent felonious purpose*, a kidnapping-felony-murder special circumstance finding cannot be sustained." (*Id.* at p. 842, emphasis added.) In *People v. Bonin* (1989) 47 Cal.3d 808, this Court held that a felony-murder special circumstance allegation "requires the trier of fact to find, inter alia, that the defendant committed the act resulting in death in order to advance *an independent felonious purpose.*" (*Id.* at p. 850, emphasis added.)

Over the past 20 years, this Court has repeatedly affirmed that the special circumstance requires the jury to find that the murder was committed in order to advance the independent felonious purpose of the underlying felony. (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 464-465; *People v. Guerra* (2006) 37 Cal.4th 1067, 1133; *People v. Davis* (2005) 36 Cal.4th 510, 568-569; *People v. Prieto* (2003) 30 Cal.4th 226, 256-257; *People v. Riel* (2000) 22 Cal.4th 1153, 1201; *People v. Martinez* (1999) 20 Cal.4th 225, 236-237; *People v. Davis* (1995) 10 Cal.4th 463, 519, fn. 17; *People v. Garrison* (1989) 47 Cal.3d 746, 791.)

Accordingly, where the evidence supports an inference that the defendant "might have intended to murder the victim without having an independent intent to commit the specified felony," a trial court must instruct on the second paragraph of CALJIC No. 8.81.17. (*People v. Monterroso* (2004) 34 Cal.4th 743, 767; see also *People v. Harden* (2003) 110 Cal.App.4th 848, 860-866.) As this Court stated in *People v. Navarette* (2003) 30 Cal.4th 458:

> The second paragraph of CALJIC No. 8.81.17 is appropriate where the evidence suggests the defendant may have intended to murder his victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation. In other words, if the felony is merely incidental to achieving the murder-the murder being the defendant's primary purpose-then the special circumstance is not present, but if the defendant has an "independent felonious purpose" (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present.

(*Id.* at p. 505.)

In this case, it is not surprising that the prosecution sought to modify CALJIC No. 8.81.17 by eliminating the requirement that it prove that the murder "was committed in order to carry out or advance the commission of" the attempted robbery: that requirement was the weak link in the prosecution's proof of the sole special circumstance. The prosecution's evidence showed that appellant stated "excuse me," showed the manager the pistol in the holster, and said, "Can you put that money in this box?" The victim ignored the request and began walking away from appellant. Then, as two of the prosecution's witnesses testified, appellant shot the victim out of "frustration." (8 RT 1374-1375 [testimony of Officer Dryva]; 8 RT 1456 [testimony of Marla Jo Fisher]; see also Arg. 5, *ante*.) This evidence, and the inferences reasonably drawn therefrom, supported giving the "carry out or advance" language from the pattern instruction because the jury could reasonably have concluded that any intent to steal no longer existed when appellant shot the victim. Indeed, this was essentially appellant's entire defense to the alleged special circumstance. [56] The trial court erred by

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56. Appellant did not contend that the jury could not find the felony-murder special circumstance under these facts. Instead, he argued that the jury could reasonably infer that the shooting was not committed in order to

Footnote continued on next page . . .

omitting that language.

The error was not cured by the language added by the trial court: "the murder was committed in the course of the commission of the crime of attempted robbery, or to facilitate the escape therefrom or to avoid detection." (10 RT 1978-1979.) That language repeated nearly verbatim the requirement already present in paragraph *one* of the instruction: "the murder was committed while the defendant was engaged in the attempted commission of a robbery . . . ." There is "no substantial difference between the two statutory phrases, 'during the commission of,' and 'while engaged in the commission of.'" (*People v. Guzman* (1988) 45 Cal.3d 915, 950, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see also *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 905, fn. 2.)

Nor was the error cured by inclusion of the final sentence from paragraph two of CALJIC No. 8.81.17: "In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder." (10 RT 1978-1979.) In *People v. Horning* (2004) 34 Cal.4th 871, where the trial court gave the second, but not the first, sentence of paragraph two of CALJIC No. 8.81.17 (*id.* at p. 907), this Court concluded that the court's explanation that the burglary or robbery must not be "merely incidental to the commission of the murder" adequately conveyed the "carry out or advance" the felony requirement. (*Id.* at p. 908.) In appellant's case, however, the "merely incidental" sentence did not adequately convey that requirement. By its own

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carry out or advance the commission of an attempted robbery. In advisory counsel Freeman's words, there was no "integrated transaction," i.e., the attempted robbery was separate from the killing. Whatever intent he may have had in asking for the money, appellant argued, that intent no longer existed when he shot the manager.

terms ("In other words") and by its location (immediately following the court's added sentence), that sentence logically referred to whether "the murder was committed in the course of the commission of the crime of attempted robbery, or to facilitate the escape therefrom or to avoid detection," and that is how a reasonable juror would have interpreted the meaning of the "merely incidental" language. The "merely incidental" sentence did not adequately or logically inform the jury that it must find that "the defendant committed the act resulting in death in order to advance an independent felonious purpose."

2. The Trial Court Erred in Instructing the Jury That an Attempted Robbery Is in Progress Until the Perpetrator Reaches a Place of Temporary Safety

At the guilt phase, the jury was also instructed with CALJIC No. 8.21.1, concerning when a robbery is still in progress:

> For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time. An attempted robbery is still in progress after the attempted taking of the property and while the perpetrator is fleeing in an attempt to escape. Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrator. An attempted robbery is complete when the perpetrator has eluded any pursuers, and has reached a place of temporary safety.

(3 CT 790; 10 RT 1981; see Arg. 7, *ante*.) [57]

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57. As set forth in Argument 7, *ante*, CALJIC No. 8.21.1 was submitted by the prosecution. (2 CT 687.) Appellant objected to the instruction, and the prosecutor withdrew it. (8 RT 1483-1484, 1492.) At a subsequent instructional hearing, the trial court brought up the instruction and asked whether there was any objection. Appellant replied, "No, Sir." (9 RT 1579.)

Although appellant failed to lodge a second objection, the issue may be raised on appeal. Section 1259 permits appellate review to the extent any erroneous instruction "affected [appellant's] substantial rights." This Court

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It is clear from both its placement in the instructions, i.e., not only after the instruction on felony-murder first degree murder, but also after CALJIC No. 8.81.17 (3 CT 776, 782), and by its language -- referring to whether the killing "occurred during the commission or attempted commission of robbery" -- that the instruction applied to the felony-murder special circumstance as well as to the felony-murder theory of first degree murder. (See *People v. Carrasco* (1981) 118 Cal.App.3d 936, 943-944; *Falconer v. Lane* (7th Cir. 1990) 905 F2d 1129, 1136.) No reasonable juror would have concluded otherwise.

The effect of the instruction is also clear: as explained in Argument 7, *ante*, it amounted to a directed verdict on the issue of whether the killing occurred during the commission of attempted robbery. In *People v. Sakarias* (2000) 22 Cal.4th 596, during deliberations, the jury asked the trial court two questions concerning the duration of the underlying felonies for purposes of first degree felony murder. The trial court, drawing language from this Court's opinion in *People v. Mason* (1960) 54 Cal.2d 164, 169, instructed the jury that:

> "Although it is alleged that the killing in the present case occurred sometime after it is alleged the defendant entered the house, if the jury finds that the defendant committed burglary by entering the house with the intent to steal, the homicide and the burglary are parts of one continuous transaction."

(*People v. Sakarias*, *supra*, 22 Cal.4th at p. 623.) On appeal, this Court agreed with the defendant's contention that the trial court's response "erroneously removed a factual issue from the jury's consideration[.]" (*Ibid.*) This Court explained that the trial court had erred in using language from cases involving

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has held that "[i]nstructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4.)

whether there was sufficient evidence to support a conviction of first degree murder:

> But to hold, as we did in these cases . . . that evidence sufficient to show a single continuous transaction justifies an instruction or conviction on felony murder, is not to hold that the judge, rather than the jury, decides whether the existence of such a single transaction and, hence, a murder in the perpetration of the felony, was proven beyond a reasonable doubt. Even where substantial evidence supports such a finding, it is for the jury to decide whether or not the murder was committed "in the perpetration of" (§ 189), or "while the defendant was engaged in. . . the commission of" (§ 190.2, subd. (a) (17)), the specified felony.

(*Id.* at p. 624.)

In *Sakarias*, the error was committed in the trial court's answer to a jury's question; here, the error was committed by delivering CALJIC No. 8.21.1. But the effect is the same: in both cases, a factual issue in the case was removed from the jury's determination. The instruction amounted to a directed verdict on the issue of whether the killing occurred during the commission of attempted robbery. (See Arg. 7, *ante.*)

The error was exacerbated by the language in the first paragraph of CALJIC No. 8.81.17 regarding "flight":

> To find that the special circumstance referred to in these instructions as murder in the commission of attempted robbery is true, it must be proved, one, that murder was committed while the defendant was engaged in the attempted commission of a robbery, *or the murder was committed during the immediate flight after the attempted commission of a robbery by the defendant* . . . .

(10 RT 1978-1979, emphasis added.) In combination with the erroneous CALJIC No. 8.21.1, this language expressly permitted the jury to find the special circumstance true without it finding that the killing occurred "while the defendant was engaged in" an attempted robbery. This is especially true because the two paragraphs in part one of the instruction were given in the

conjunctive ("or"). (3 CT 782; see § A, *ante.*)

The trial court erred in giving this instruction to the jury.

C. Appellant's State and Federal Constitutional Rights Were Violated by the Trial Court's Errors

Delivery of CALJIC No. 8.21.1, together with the "flight" language in CALJIC No. 8.81.17, violated appellant's right to due process, to trial by jury, and to proof beyond a reasonable doubt of each element of the special circumstance (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; see *United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-526; *People v. Sakarias*, *supra*, 22 Cal.4th at pp. 624-625; *People v. Kobrin* (1995) 11 Cal.4th 416, 423-428), including "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277; see Arg. 7, *ante.*) With regard to the deletion of the "carry out or advance" language from CALJIC No. 8.81.17, the trial court's failure to instruct on "an element of a special circumstance" was both federal and state constitutional error. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1187; *People v. Odle* (1988) 45 Cal.3d 386, 410-411, disapproved on other grounds in *People v. Prieto* (2003) 30 Cal.4th 226, 256.) [58]

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58. This Court has held that the "second paragraph of the instruction does not set out a separate element of the special circumstance; it merely clarifies the scope of the requirement that the murder must have taken place 'during the commission' of a felony." (*People v. Harris* (2008) 43 Cal.4th 1269, 1299; see also *People v. Kimble* (1988) 44 Cal.3d 480, 501.) However, even if not technically deemed an "element" of the special circumstance, the *Green-Thompson* requirement "is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict" and, as such, must be found true by the jury beyond a reasonable doubt. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19; accord, *Ring v. Arizona* (2002) 536 U.S. 584, 609.) "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the

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The trial court's errors also violated appellant's right under the Sixth and Fourteenth Amendments to the federal Constitution, and the parallel provisions of the state Constitution, to present a complete defense, including the right to instructions that allow the jury to consider the defense. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Mathews v. United States* (1988) 485 U.S. 58, 63; *Clark v. Brown*, *supra*, 450 F.3d at p. 916; *People v. Lucas* (1995) 12 Cal.4th 415, 456; *People v. Frierson* (1985) 39 Cal.3d 803, 816, fn. 5.)

The errors also violated the Eighth and Fourteenth Amendments, which require that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, 541.) A death penalty statute must, by rational and objective criteria, narrow the group of murderers upon whom the ultimate penalty can be imposed. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) In California, the special circumstances listed in section 190.2 "perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances'" used in the capital sentencing statutes of some other states. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) These "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

Given their importance, death-eligibility factors must provide both "clear and objective standards" and "specific and detailed guidance" for the sentencing jury. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) In this case, the instructional errors failed to provide clear and objective standards to the jury, and failed to adequately and rationally narrow the class of death-eligible

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offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt." (*Ring*, *supra*, at p. 610 (conc. opn. of Scalia, J.).)

defendants. Those failures, and the subsequent use of the special circumstance at the penalty phase, denied appellant his rights to a fair and reliable capital guilt trial, and to a fair and reliable capital penalty trial. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305 (opn. of Stewart, Powell, and Stevens, JJ.); *People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

Further, to the extent that state law was violated, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the arbitrary withholding of a right provided by state law. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 1, 7, 15, 16; see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 344-347.) He also had a life interest under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), and the parallel provisions of the state Constitution, in having the jury accurately instructed on the sole special circumstance allegation in this case.

D. The Sole Special Circumstance and the Ensuing Death Judgment Must Be Reversed

Because the jury was never asked to determine, but was essentially instead directed to find, that an element of the special circumstance had been proven, delivery of the erroneous instruction was a "structural error" which is reversible per se. (*Sullivan* v. *Louisiana*, *supra*, 508 U.S. at pp. 277-282; *Rose* v. *Clark* (1986) 478 U.S. 570, 578; see *People* v. *Kobrin*, *supra*, 11 Cal.4th at pp. 428-429.) Moreover, because the trial court removed from the jury's consideration the factual question of whether the killing was committed to carry out or advance the commission of the underlying felony, and the factual question concerning the duration of an attempted robbery for purposes of felony murder, "there has been no jury verdict [on the special circumstance] within the meaning of the Sixth Amendment [and] the entire premise of [harmless error] review is simply absent." (*Sullivan*, *supra*, at p. 280; see also

Conde v. Henry (9th Cir. 2000) 198 F.3d 734, 740-741.)

If the errors are subject to a prejudice determination, an error of this kind, which denies fundamental rights and lightens the prosecution's burden of proof, requires reversal unless the error "surely" did not contribute to the verdict. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Similarly, an erroneous jury instruction that, as here, misinstructs on or omits an element of or a finding required to establish the offense violates the defendant's due process right to a jury trial and is subject to the beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Neder v. United States* (1999) 527 U.S. 1, 6-8.) Under that test for harmless error, the robbery-murder special circumstance finding against appellant must be reversed.

The instructional errors here directly impacted the central issue in the case: whether the attempted robbery and the subsequent killing proved the sole special circumstance. That special circumstance was contested, not conceded, by appellant. He specifically argued that the attempted robbery was over when the victim walked away, and that there was evidence that he killed out of frustration and not to advance a robbery. (10 RT 2033-2034.)

No other instruction informed the jury that it must find that the murder was committed in order to advance the independent felonious purpose of the underlying felony. Indeed, as argued above, the jury was instructed that it could find the special circumstance true if the killing was "committed during the immediate flight after" an attempted robbery. These instructions gave the jurors considerable temporal leeway for erroneously finding the attempted robbery-murder special circumstance to be true even if they found that the killing was *not* committed to advance the underlying felony. In his argument to the jury, the prosecutor capitalized on the erroneous instructions:

> Now, this explains how far and wide this course of attempted robbery is defined. Likewise, it is still in progress so long as

> immediate pursuers are attempting to capture the perpetrator. Attempted robbery is complete when the perpetrator had eluded any pursuers and has reached a place of temporary safety.
>
> Some of you must have been wondering, wasn't the attempted robbery complete at the time that, say, the safe was closed? No. You see, an attempted robbery is complete when the perpetrator has eluded any pursuers and has reached a place of temporary safety.
>
> Mr. Frederickson didn't reach a place of temporary safety until much further past the actual murder of Scott Wilson. . . . . So anyone killed, if he killed somebody during that period before he reached that temporary safety, place of safety, he's still liable for that first degree murder under what? The felony-murder rule.

(10 RT 1995-1996.)

A reasonable juror, correctly instructed on the attempted robbery-murder special circumstance, could have and "may very well have concluded that the prosecution failed to prove" (*Conde v. Henry, supra*, 198 F.3d at p. 741) that the murder was committed in order to carry out or advance the commission of the crime of attempted robbery. Under such circumstances, the instructional error cannot properly be deemed harmless: "If at the end of [an] examination [of the record] the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, when the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." (*Neder v. United States, supra,* 527 U.S. at p. 12; *Conde, supra,* at pp. 741-742.)

The People cannot meet their burden of establishing that the erroneous modification of CALJIC No. 8.81.17 and the giving of CALJIC No. 8.21.1 "surely" did not contribute to the verdict (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279; *People v. Kobrin, supra,* 11 Cal.4th at p. 430) and/or was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24). The attempted robbery-murder special circumstance, as well as the ensuing

death judgment -- of which a valid special circumstance is a prerequisite (§ 190.2, subd. (a); *People v. Marshall* (1997) 15 Cal.4th 1, 44; *People v. Fuentes* (1985) 40 Cal.3d 629, 641) -- must therefore both be reversed.

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9. THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE CONSTITUTIONAL REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

A. Introduction

Both the state and federal constitutions "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510; see *People v. Roder* (1983) 33 Cal.3d 491, 497; Cal. Const., art. I, §§ 7, 15 & 16; § 1096.) The reasonable-doubt standard "provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship* (1970) 397 U.S. 358, 363; citation omitted) and at the heart of the right to trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278). Jury instructions violate these constitutional requirements and those of their state constitutional analogs if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

In this case, the trial court instructed the jury with a series of standard CALJIC instructions which, considered separately and together, violated the above principles by posing a reasonable likelihood that the jurors understood the instructions to allow them to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.)

B. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given four interrelated instructions that discussed the

relationship between the reasonable doubt requirement and circumstantial evidence. [59] These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (3 CT 749, 770, 791-192, 793; 10 RT 1965, 1973-1974, 1982-1984.)

These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty -- even if they entertained a reasonable doubt as to guilt. This four-times repeated directive undermined the reasonable doubt requirement in two separate but related ways.

First, the instructions not only allowed, but compelled, the jury to find appellant guilty of first degree murder and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. The

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59. These instructions included CALJIC Nos. 2.01, regarding the sufficiency of circumstantial evidence, and 2.02, regarding the sufficiency of circumstantial evidence to prove specific intent or mental state (3 CT 769-770; 10 RT 1973-1974); and CALJIC Nos. 8.83, regarding circumstantial evidence and the special circumstance, and 8.83.1, regarding the sufficiency of circumstantial evidence to prove required mental state for a special circumstance (3 CT 791-793; 10 RT 1982-1984).

The trial court also instructed the jury that appellant was "presumed to be innocent until the contrary is proved," and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (10 RT 1972.) The court defined reasonable doubt as follows:

> [I]t is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(3 CT 767; 10 RT 1972; CALJIC No. 2.90 (6th ed. 1996).)

instructions directed the jury to find appellant guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty"], emphasis in original.) Thus, there is a reasonable likelihood that the jury understood the instructions to allow conviction based on a constitutionally insufficient standard of proof. (See *Victor v. Nebraska*, *supra*, 511 U.S. at p. 6.)

Second, the instructions required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." All four instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." By informing the jurors that they "must" accept such an interpretation, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-524.)

In *People v. Roder*, *supra*, 33 Cal.3d at page 504, this Court invalidated an instruction that required the jury to presume the existence of a single element

of the crime unless the defendant raised a reasonable doubt as to the existence of that element. A fortiori, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The jury was further confused and misled by CALJIC No. 2.01 because it characterized the jury's choice as "guilt" or "innocence." (3 CT 749.) The use of such terminology undercut the prosecution's burden of proof because the issue in a criminal trial is not one of guilt or innocence, but rather whether there is a reasonable doubt as to the prosecution's evidence. This error encouraged the jurors to find appellant guilty because it had not been proven that he was "innocent."

C. Other Instructions Also Vitiated the Reasonable Doubt Standard

The trial court also gave several instructions that individually and collectively diluted the constitutionally-mandated reasonable doubt standard: CALJIC No. 2.21.1, regarding discrepancies in testimony (3 CT 754; 10 RT 1967); CALJIC No. 2.21.2, regarding willfully false witnesses (3 CT 755; 10 RT 1967); [60] CALJIC No. 2.22, regarding weighing conflicting testimony (3

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60. During an instructional conference, the trial court stated: "I'm assuming defense wants 2.21.2? Witness willfully false." Appellant responded affirmatively. (8 RT 1476.) Nonetheless, the claim is cognizable on appeal. The error cannot be deemed "invited" because the invited error doctrine does not apply where a party merely acquiesces to an instruction (*People v. Moon* (2005) 37 Cal.4th 1, 28); nor does it apply where there was no "conscious and deliberate tactical choice" by the defense (*People v. Lucero* (2000) 23 Cal.4th 692, 723). Further, an appellate court may review "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (*People*

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CT 756; 10 RT 1968); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (3 CT 757; 10 RT 1968); and CALJIC No. 8.20, regarding premeditated and deliberate murder (3 CT 774-775; 10 RT 1975-1976). Each of these instructions urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a defendant upon any lesser standard of proof. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 277-278.)

CALJIC Nos. 2.21.1 [discrepancies in testimony] and 2.21.2 [witness willfully false] (3 CT 754-755) authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (3 CT 755, emphasis added.) [61] These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"]; [62] see also

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v. Brown (2003) 31 Cal.4th 518, 539, fn. 7, quoting § 1259.) The instant instructional error clearly affected appellant's substantial rights, since it unfairly made it easier for the jury to convict appellant of capital murder.

61. The instructions also cautioned that discrepancies between witnesses, or within a witness's own testimony, do not necessarily mean that the witness should be discredited. Whether a discrepancy pertained to an important fact or trivial detail "should be considered" by the jurors in weighing its significance. (3 CT 754.)

62. The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on

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Sandstrom v. Montana, *supra*, 442 U.S. at pp. 521-524.) The essential mandate of *Winship* and its progeny -- that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt -- is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, the jury was instructed with CALJIC No. 2.22 as follows:

> You are not bound to decide an issue of fact in accordance with the number of witnesses which does not convince you as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(3 CT 756.) This instruction informed the jurors that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the

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evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

convincing force of the evidence." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 277-278.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (3 CT 757), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant cannot be required to establish or prove any "fact." (See *People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.) By telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of that fact depends" -- without qualifying this language to apply only to *prosecution* witnesses -- the instruction permitted the jurors to conclude that appellant himself had the burden of convincing them that the homicide was not a first degree murder and that the special circumstance was not true, and that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's observation, however, does not address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's state and federal constitutional rights to due process and a fair jury trial, and his right to a reliable determination of death eligibility under the Eighth and Fourteenth Amendments.

CALJIC No. 2.27 further violated due process by using the "which you

believe" language, thereby allowing proof based on mere "belief" that a single witness was telling the truth, rather than the constitutionally-required proof beyond a reasonable doubt. The instruction erroneously suggested to the jurors that they need not "carefully review" the testimony of two or more such prosecution witnesses, thereby likewise unconstitutionally lessening the prosecution's burden of proof.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation. . . ." (3 CT 774, emphasis added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation and deliberation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "absolutely prevent"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) The disputed instructions in this and the immediately-preceding section, considered individually and together, impermissibly diluted the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand -- in the face of so many instructions permitting conviction upon a lesser showing -- that he or she must find appellant not guilty unless every element of the offense was proven by the prosecution beyond a reasonable doubt.

D. The Error Violated Appellant's State and Federal Constitutional Rights

The challenged instructions invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. As a result, they violated appellant's rights under the state and federal constitutions, which "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt" (*United States v. Gaudin*, *supra*, 515 U.S. at pp. 509-510, citing *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364), and his right to a jury trial. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16.)

Further, the instructions were erroneous under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution, which require that the procedures that lead to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Ford v. Wainwright*, *supra*, 477 U.S. at p. 411; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) Here, there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard of proof beyond a reasonable doubt. By injecting unreliability into the process leading to the death sentence, the instructions diminished the reliability of the deliberations and the guilt and special circumstance findings, and created a substantial risk that the guilt and special circumstance findings were neither fair nor reliable. Neither is acceptable when life is at stake. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).)

Although each one of the challenged instructions violated appellant's

federal constitutional rights, this Court has repeatedly rejected constitutional challenges to the instructions discussed here. (See e.g., *People v. Kelly* (2007) 42 Cal.4th 763, 792 [CALJIC Nos. 2.21.1 & 2.21.2]; *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC No. 2.22]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. Appellant respectfully requests this Court to reconsider those rulings and hold that in this case delivery of the aforementioned instructions was error.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 6.)

Second, this Court's essential rationale -- that the flawed instructions were remedied by the language of CALJIC No. 2.90 (e.g., *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144) -- requires reconsideration. An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see also *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to

absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one -- rather than vice-versa -- the principle does not apply in this case. The allegedly curative instruction (CALJIC No. 2.90) was overwhelmed by the unconstitutional ones. Appellant's jury heard several separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1996) 3 Cal.4th 926, 943.) Under this principle, it cannot be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

E. Reversal of the Entire Judgment Is Required

Because the erroneous instructions permitted conviction on a standard of proof less than proof beyond a reasonable doubt, delivery of the instructions was structural error and is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.) Even if not reversible per se, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the state can show that the errors were harmless beyond a reasonable doubt. (See *Victor v. Nebraska, supra*, 511 U.S. at p. 6.)

The state cannot make that showing here. The erroneous instructions related to the central and disputed issues in the case: whether the facts established an attempted robbery theory of first degree felony murder and the attempted robbery felony-murder special circumstance, and whether appellant had the specific intent to commit an attempted robbery. In these circumstances, and particularly when considered with the other instructional errors set forth in this brief, "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska, supra*, 511 U.S. at p. 6.) Accordingly, the judgment of conviction, the special circumstance finding, and the death sentence must be reversed.

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10. THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY INSTRUCTED THE JURY TO FOCUS ON APPELLANT'S FLIGHT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

A. Factual Background

The prosecution requested the trial court to instruct the jury with CALJIC No. 2.52, regarding "flight after crime." (2 CT 687.) Appellant objected that the instruction was inappropriate under the evidence and that giving the instruction would be "prejudicial." (8 RT 1477-1478.) The prosecutor responded:

> He left, fled the scene of the attempted robbery and murder by actually parking his vehicle in an escape manner. And I think it's a consciousness of guilt on his part by fleeing.
>
> And I think part of his defense is a mental state defense that we are going to hear, and flight goes to that mental state issue that he's going to be bringing up in his side of the case.

(8 RT 1478.) The trial court overruled the objection, concluding that:

> I think the issue here is the evidence that the shooter ran from the store out the entry door, then ran down the sidewalk behind the building, got in a car and took off. Under the circumstances I think it is an appropriate instruction to give. There are sufficient facts to warrant giving the instruction.

(8 RT 1478-1479.) Accordingly, the jury was instructed:

> The flight of a person immediately after the commission of a crime, or after [he] is accused of a crime, is not sufficient in itself to establish [his] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(3 CT 759, brackets in original; 10 RT 1968-1969 [oral instruction].) [63]

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63. With regard to the special circumstance, the jury was instructed that the prosecution must prove, inter alia, "that murder was committed while the

Footnote continued on next page . . .

B. The Trial Court Erred in Instructing the Jury to Focus on Appellant's Flight As Evidence of Consciousness of Guilt

The trial court erred in giving the flight instruction because that instruction was unnecessary and argumentative, and permitted the jury to draw constitutionally impermissible inferences against appellant.

1. The Flight Instruction Was Unnecessary and Argumentative

An instruction on flight was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455, disapproved on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Lewis* (2001) 26 Cal.4th 334, 362-363.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (3 CT 748-749, 770.) These instructions informed the jury that it may draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt -- including his state of mind -- from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of a permissive inference of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of *reasonable doubt* about guilt.

Moreover, the instruction was argumentative. A trial court must refuse to deliver argumentative instructions (*People v. Panah* (2005) 35 Cal.4th 395, 486; *People v. Sanders* (1995) 11 Cal.4th 475, 560), defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items

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defendant was engaged in the attempted commission of a robbery, or the murder was committed during the immediate *flight* after the attempted commission of a robbery by the defendant[.]" (10 RT 1978-1979, emphasis added.)

of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if neutrally phrased, an instruction is argumentative if it "ask[s] the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "impl[ies] a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9).

Judged by this standard, the flight instruction was impermissibly argumentative. Structurally, it is almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th at page 437, footnote 5, which read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

The instruction here told the jury, "[i]f you find" certain facts (flight in this case, and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case, and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and by a parity of reasoning it should hold CALJIC No. 2.52 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *Mincey*, *supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not. To ensure fairness and equal treatment, this Court should

reconsider its decisions concluding that the flight instruction is not argumentative. (See, e.g., *People v. Loker* (2008) 44 Cal.4th 691, 706.) Except for the party benefited by the instructions, there is no discernible difference between the instructions this Court has upheld (see, e.g., *Nakahara*, *supra*, at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"], vacated on other grounds, *Bacigalupo v. California* (1992) 506 U.S. 802) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence" (*People v. Wright* (1988) 45 Cal.3d 1126, 1137).

2. The Flight Instruction Permitted the Jury To Draw an Impermissible Inference Concerning Appellant's Guilt

The flight instruction suffers from an additional defect: by permitting the jury to infer one fact, appellant's consciousness of guilt, from another fact, flight, it created an improper permissive inference.

The Due Process Clause of the Fourteenth Amendment "demands that even inferences -- not just presumptions -- be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313; see also *People v. Roder* (1983) 33 Cal.3d 491, 503-504.) For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Id.* at pp. 165-167 & fn. 28.) This test is applied to judge the inference as it operates under the facts of each specific case. (*Id.* at pp. 156, 162-163.)

In this case, there was no dispute that appellant caused the victim's death: appellant conceded identity. (9 RT 1568-1569; 10 RT 2013-2014, 2019.) The sole issues at trial were whether the facts established an attempted

robbery theory of first degree felony murder and the attempted robbery felony-murder special circumstance, and whether appellant had the specific intent to commit an attempted robbery. Although consciousness-of-guilt evidence, such as flight, may bear on a defendant's state of mind after a killing, such evidence is *not* probative of his state of mind immediately prior to or during the killing. (See *People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) In particular, "[c]onduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing." (2 LaFave, Substantive Criminal Law (2d ed. 2003), § 14.7(a), pp. 481-482, emphasis in original; see also *Wong Sun v. United States* (1963) 371 U.S. 471, 483, fn. 10 ["we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime"].)

This Court has previously rejected the claim that the flight instruction creates unconstitutional, permissive inferences concerning the defendant's mental state. (See, e.g., *People v. Howard* (2008) 42 Cal.4th 1000, 1021; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439.) Appellant respectfully asks this Court to reconsider those cases and hold that in this case delivery of the flight instruction was error.

C. The Error Violated Appellant's State and Federal Constitutional Rights

The flight instruction given here violated state law by presenting the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) The instruction unduly favored the prosecution by highlighting and emphasizing the weight of a single piece of the prosecution's circumstantial evidence. This unnecessary instructional benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment, and the

parallel provisions of the California Constitution. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection]; *People v. Moore* (1954) 43 Cal.2d 517, 526-527 ["There should be absolute impartiality as between the People and defendant in the matter of instructions"].) The error also constituted an arbitrary and unfair deprivation of appellant's state-created liberty interest in legally-correct and applicable jury instructions, in violation of the Due Process Clause of the Fourteenth Amendment (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346).

The instructional error also created an impermissible inference, and thereby lessened the prosecution's burden of proof. As a result, it violated appellant's rights under the state and federal constitutions, which "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; see also *Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 157; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 298-300 (en banc); *People v. Roder*, *supra*, 33 Cal.3d at pp. 503-504; *In re Winship* (1970) 397 U.S. 358, 364; Cal. Const., art. I, §§ 7, 15 & 16; § 1096.)

Further, the instructional error violated appellant's rights under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution, which require that the procedures that lead to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v.*

Horton (1995) 11 Cal.4th 1068, 1134-1135.) By instructing the jury with an unfairly partisan and argumentative instruction that permitted the jury to draw an irrational permissive inference about appellant's guilt, the trial court diminished the reliability of the deliberations and the guilt and special circumstance findings, and created a substantial risk that the guilt and special circumstance findings were unfair and unreliable. Neither is acceptable when life is at stake. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).)

D. Reversal of the Entire Judgment Is Required

Because the erroneous instruction permitted conviction on a standard of proof less than proof beyond a reasonable doubt, the error was structural and reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.) Even if not reversible per se, because the instruction violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 6; *Chapman v. California* (1967) 386 U.S. 18, 24.)

The state cannot make that showing in this case. Since neither flight nor identity was disputed, it was almost certain that the jury found the prosecution-favored instruction to be applicable.

Moreover, the error affected the only contested issues in the case: whether the facts established an attempted robbery theory of first degree felony murder and the attempted robbery felony-murder special circumstance, and whether appellant had the specific intent to commit an attempted robbery. Appellant argued that the jury could reasonably infer that the shooting was not committed in order to carry out or advance the commission of an attempted robbery. Whatever intent he may have had in asking for the money, appellant argued, that intent no longer existed when he shot the manager. Thus, appellant's defense was an explanation of the circumstances

of the homicide that would negate a conviction of first degree murder and a true finding of the sole special circumstance.

The effect of the improper flight instruction, however, was to tell the jury that appellant's own conduct showed he was aware of his guilt for the very charge he disputed. The instruction permitted the jury to infer that appellant was "guilty" from the undisputed evidence that appellant fled the scene: "The flight of a person immediately after the commission of a crime . . . is a fact which . . . may be considered by you . . . in deciding whether a defendant is guilty . . . ." The "guilt" necessarily referred to the sole offense for which the prosecutor was pursuing a conviction, i.e., first degree murder. This point was hammered home by the prosecutor when, in his cross-examination of Dr. Flores, he elicited "expert" testimony regarding flight and consciousness of guilt:

> Q. And, hypothetically, if a person is fleeing an incident, running away from an incident, again that's something that you might consider to determine if he has let's say a consciousness of guilt? Would you agree with me on that?
>
> A. That's usually a very important determination on whether someone is insane at the time that a particular crime was committed, absolutely. [¶ . . . ¶]
>
> Q. But in terms of the consciousness of that individual, knowing that he's done something wrong, if that guy's fleeing, it might indicate that he does realize that he did something wrong, would you agree with me?
>
> A. I would agree.

(10 RT 1917-1918.)

The instruction not only permitted the jury to infer that appellant killed the victim, but that he did so while harboring the intent or mental states required for conviction of first degree murder and the lone special circumstance. There was no rational connection -- much less one more likely than not -- between appellant's flight and an inference that he premeditated and deliberated the homicide, or that the special-circumstance allegation was

true. Flight merely establishes fear of apprehension, not premeditation, deliberation, or a specific intent to commit a robbery.

Under these circumstances, the instructional error, whether considered alone or in conjunction with the other instructional errors set forth in this brief, was not harmless beyond a reasonable doubt. Accordingly, the entire judgment must be reversed.

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11. THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY INSTRUCTED THE JURY REGARDING MOTIVE

A. Factual Background

In his guilt-phase opening statement and closing argument, appellant conceded identity. (9 RT 1568-1569; 10 RT 2013-2014, 2019.) The sole issues at trial were whether the facts established an attempted robbery theory of first degree felony murder and the attempted robbery felony-murder special circumstance, and whether appellant had the specific intent to commit an attempted robbery.

The prosecution requested the trial court to instruct the jury with CALJIC No. 2.51, regarding motive. (2 CT 687.) Appellant objected to that instruction, and argued:

> The defense is saying there is a lack of, and the prosecution is saying that there is. [¶ . . . ¶] And I understand that it's not an element, and it wouldn't be if the underlying felony had been charged, but since it hasn't, we are just going with the special circumstance, and the special circumstance is actually the motive. So motive is an element.

(8 RT 1476-1477.) The trial court overruled the objection, concluding that "[CALJIC No. 2.51 is a standard instruction that's been approved several times over. I don't see any reason not to give it." (8 RT 1477.) Accordingly, the jury was instructed:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(3 CT 758; see 10 RT 1968.)

B. The Trial Court Erred in Instructing the Jury on Motive

The trial court erred in giving the motive instruction. That instruction allowed the jury to determine guilt based on motive alone, impermissibly

lessened the prosecution's burden of proof, and shifted the burden of proof to imply that appellant had to prove innocence.

First, the motive instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. Due process requires substantial evidence of guilt; a "mere modicum" of evidence is not sufficient. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320.) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction, by informing the jurors that the presence of motive could be used to establish the defendant's guilt and that the absence of motive could be used to show the defendant was not guilty, effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. The trial court erred in giving that instruction.

Second, the jury was instructed that an unlawful killing during the attempted commission of robbery is first degree murder when the perpetrator has the specific intent to commit robbery. (3 CT 776; 10 RT 1976-1977.) By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on this element of the prosecution's capital murder case -- i.e., that appellant had the intent required for an attempted robbery.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms. (See, e.g., *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008; *People v. Bowman* (1958) 156 Cal.App.2d

784, 795; *Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6.) According to Black's Law Dictionary (6th ed. 1991) page 1014: "In common usage intent and 'motive' are not infrequently regarded as one and the same thing."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The Court of Appeal emphasized: "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction -- that motive was not an element of the crime charged and need not be proved -- was reversible error. (*Id.* at pp. 1127-1128.)

In this case, there was a similar potential for conflict and confusion. The only theory supporting felony-murder was that appellant killed in the commission of an attempted robbery. The jury was instructed to determine if appellant had the intent required for attempted robbery, but was also told that motive was not an element of the crime. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." As in *Maurer*, the trial court erred in giving the motive instruction.[64]

Third, CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. However, appellant "ha[d] no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.)

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64. In *People v. Wilson* (2008) 43 Cal.4th 1, this Court concluded that *Maurer* was distinguishable because "in that case, motive was an element of the crime for which the defendant was convicted." (*Id.* at p. 22.)

The trial court erred in giving the motive instruction.

C. The Instructional Error Violated Appellant's State and Federal Constitutional Rights

Giving the motive instruction was error of federal constitutional magnitude as well as a violation of state law. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-524; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].) As a result, it violated appellant's right not to be convicted except "upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Rowland* (1992) 4 Cal.4th 238, 268; *People v. Roder* (1983) 33 Cal.3d 491, 497; Cal. Const., art. I, §§ 7, 15 & 16; § 1096; Evid. Code, § 520.)

The instruction was also erroneous under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution, which require that the procedures that lead to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.) By allowing the jury to determine guilt based on motive alone, lessening the prosecution's burden of proof, and shifting the burden of proof to imply that appellant had to prove innocence, the instructional error reduced the reliability of the jury's determination and created a substantial risk that the

guilt and special circumstance findings were unfair and unreliable. Neither is acceptable when life is at stake. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).)

This Court has repeatedly rejected these claims. (See, e.g., *People v. Howard* (2008) 42 Cal.4th 1000, 1024; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134-1135; *People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Noguera* (1992) 4 Cal.4th 599, 637.) Appellant respectfully requests this Court to reconsider those cases and hold that in this case delivery of the motive instruction was error.

D. Reversal of the Entire Judgment Is Required

Because the erroneous motive instruction permitted conviction on a standard of proof less than proof beyond a reasonable doubt, the error was structural and reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.) Even if not reversible per se, because the instruction violated appellant's federal constitutional rights, reversal is required unless the state can show that the error was harmless beyond a reasonable doubt. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 6; *Chapman v. California* (1967) 386 U.S. 18, 24.) It cannot do so.

The error affected the only contested issues in the case: whether the requirements for first degree felony murder and the felony-murder special circumstance were established, and whether appellant had the specific intent to commit an attempted robbery.

Further, the motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, the flight instruction, which also addressed an individual circumstance, expressly admonished that it was insufficient to establish guilt. (3 CT 759.) The placement of the motive instruction, which was read immediately before the flight instruction and contained no such admonition, served to highlight its different standard.

Because the context here highlighted the omission in CALJIC No. 2.51, the instruction undoubtedly influenced the jurors' deliberations. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

Accordingly, this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of the entire judgment.

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12. THE TRIAL COURT ERRONEOUSLY REFUSED APPELLANT'S REQUESTS THAT THE SENTENCING JURORS BE INSTRUCTED NOT TO DOUBLE-COUNT AGGRAVATING FACTS AND FACTORS

A. The Trial Court Erroneously Refused Appellant's Request to Instruct the Sentencing Jurors Not to Double-Count the Facts Underlying the Special Circumstance

The jury found the one alleged special circumstance to be true: that the killing was committed while appellant was engaged in the attempted commission of robbery. (3 CT 808; § 190.2, subd. (a)(17)(i).) The trial court instructed the capital sentencing jurors that:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may hereafter be instructed. You may consider, take into account and be guided by the following factors, if applicable:
>
> (a), the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

(16 RT 3090-3091.) [65]

In *People v. Melton* (1988) 44 Cal.3d 713, this Court observed that factor (a) poses a risk that the jury might double-count special circumstances since it "tells the penalty jury to consider the 'circumstances' of the capital crime and any attendant statutory 'special circumstances.'" (*Id.* at p. 768; accord, *People v. Ashmus* (1991) 54 Cal.3d 932, 997.) For that reason, this Court has instructed trial courts that, upon a defendant's request, the jury should be admonished not to double-count. (*Melton, supra*, at p. 768.)

Appellant made that request here. He submitted a proposed

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65. The written version of the instruction told the jurors that they "shall consider" the sentencing factors, rather than "may consider . . . ." (3 CT 1049; see Arg, 15, *post.*)

instruction, Defense O, on the jurors' consideration of facts under factor (a):

> You must not consider as an aggravating factor the existence of any special circumstances [*sic*] if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. ¶ In other words, do not consider the same facts more than once in determining the presence of aggravating factors.

(3 CT 1013.) The trial court refused to give the instruction, concluding that it was covered under CALJIC No. 8.88. (16 RT 3003.)

The court erred because Defense O was a correct statement of the law that must be given when requested by the defense. In *People v. Monterroso* (2004) 34 Cal.4th 743, the trial court refused a defense proposed instruction containing language identical to the one proposed by appellant in this case. [66] This Court concluded that this language correctly stated the law and should have been given. (*Id.* at pp. 789-790; accord, *People v. Ayala* (2000) 24 Cal.4th 243, 289.) The trial court here erred in refusing appellant's requested instruction.

Under state law, a trial court's erroneous refusal of a defendant's proper instruction at a capital penalty trial requires reversal of the death judgment if there is a reasonable possibility that the failure to give the instruction affected the jury's verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448-449.) When the error is a failure to give a defense-requested instruction on double-counting, this Court has often concluded that the error is not prejudicial because it is "unlikely" that jurors would actually double-count absent the prosecutor encouraging them to do so in his argument.

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66. The instruction at issue in *Monterroso* also contained one sentence regarding the jury's consideration of multiple special circumstances which was held to be an incorrect statement of law. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 789.) That sentence was not part of appellant's proposed instruction. (3 CT 1013.)

(E.g., *People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Melton*, *supra*, 44 Cal.3d at pp. 768-769.)

In the present case, however, the special circumstance that the killing was committed while appellant was engaged in the attempted commission of robbery was particularly susceptible to being improperly double-counted by the jury. Reasonable jurors would likely have considered the fact of killing in the course of an attempted robbery as an aggravating circumstance of the crime. They would then reasonably have followed the clear language of the instruction and give additional weight to the same fact as a special circumstance. No misleading argument by the prosecutor was necessary for the jurors to make this mistake. [67] Without appellant's proposed instruction, there is at least a reasonable possibility that the jury would have returned a verdict of life without the possibility of parole. (See *People v. Brown* (1988) 46 Cal.3d 432, 437-438.)

The error also violated appellant's federal constitutional rights to due process, a fair trial, and a reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution. An instruction, such as the one given here, which permits capital sentencing jurors to double-count or overweigh aggravating factors may skew the weighing process and "creates the risk that the death penalty will be imposed arbitrarily and thus, unconstitutionally." (*United States v. McCullah* (10th Cir. 1996) 76

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67. Moreover, when the standard criminal jury instructions were recently rewritten, the phrase "and the existence of" language in CALJIC No. 8.85 was deleted. The new form instruction, CALCRIM No. 763, describes factor (a) as: "The circumstances of the crime[s] that the defendant was convicted of in this case and any special circumstances that were found true." If the Judicial Council's Task Force on Criminal Jury Instructions believed that the phrase "and the existence of any special circumstances" meant "and any special circumstances," then it is likely that capital sentencing jurors would as well.

F.3d 1087, 1111-1112.) For the reasons given above, the People cannot show beyond a reasonable doubt that the error did not affect the jury's penalty verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) The judgment of death must therefore be reversed.

B. The Trial Court Erroneously Refused Appellant's Requested Instruction Seeking to Limit the Jurors' Consideration of the Facts Used to Find First Degree Murder

The trial court also refused a penalty phase instruction proposed by appellant, Defense P, which sought to constrain the jurors' consideration and weighing of the facts underlying the first degree murder conviction:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact that was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree.

(3 CT 1014.) The trial court refused to give the instruction, concluding that it was cumulative to CALJIC No. 8.85. (16 RT 3003.)

The trial court's refusal to give appellant's proposed instruction violated his constitutional rights to a reliable sentencing determination, due process and a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

In *People v. Moon* (2005) 37 Cal.4th 1, the defendant complained that the trial court's rejection of a defense-proposed instruction nearly identical to Defense P violated the Eighth and Fourteenth Amendments to the federal Constitution. On appeal, this Court noted that it had rejected the same argument in *People v. Earp* (1999) 20 Cal.4th 826, 900, in which it concluded that "section 190.3, factor (a) expressly permits the jury to consider at the penalty phase the circumstances of the crime and the existence of any special circumstances it finds true." (*Moon, supra* at p. 40.)

Pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant hereby raises this claim and requests this Court to reconsider the arguments raised in *Moon* and conclude that the failure to instruct the capital-sentencing jurors not to consider as an aggravating factor any fact that was used in finding the defendant guilty of murder in the first degree, unless that fact establishes something in addition to an element of the crime of murder in the first degree, posed a substantial risk that the jurors would double-count or overweigh aggravating circumstances under factor (a).

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13. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN REFUSING A NUMBER OF PENALTY-PHASE JURY INSTRUCTIONS REQUESTED BY THE DEFENSE

A. Factual Background

Appellant requested a number of penalty-phase instructions that would have clarified the standard penalty-phase CALJIC instructions and provided guidance to the jurors regarding their consideration of mitigating and aggravating factors, their weighing of those factors, and their ability to consider mercy and sympathy in making their life-or-death decision. The trial court refused all but three of those instructions,[68] and instructed the jury in accordance with CALJIC No. 8.85, as follows, in part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may hereafter be instructed. You may consider, take into account and be guided by the following factors, if applicable:
>
> (a), the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. [¶ . . . ¶]
>
> (k), any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the

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68. Appellant's proposed instruction on the absence of mitigating factors was given as requested. (3 CT 1051; 16 RT 3092.) Two of appellant's proposed instructions were given but modified by the trial court: an instruction regarding the assumption that the penalty imposed would be carried out (3 CT 1067; 16 RT 3100); and an instruction regarding lingering doubt (3 CT 1052; 16 RT 3092-3093).

guilt or innocence phase of this trial which conflicts with this principle.

(3 CT 1049-1050; 16 RT 3090-3092.) The jury was also instructed in accordance with CALJIC No. 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. [¶] A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(3 CT 1068-1069; 16 RT 3100-3101.)

B. The Trial Court Erred in Refusing the Instructions Requested by Appellant

Under state law, a trial court must instruct the jury at the penalty phase "on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case." (*People v. Benavides* (2005) 35 Cal.4th 69, 111; see also *People v. Stanworth* (1969) 71 Cal.2d 820, 841.) Moreover, a defendant is entitled at the penalty phase "to instructions that pinpoint the theory of the defense case." (*People v. Gurule* (2002) 28 Cal.4th 557, 660; see also *People v. Davenport* (1985) 41 Cal.3d 247, 281-283 (plur. opn.); § 1127.) Similarly, under federal law, a "trial judge's duty is to give instructions sufficient to explain the law" (*Kelly v. South Carolina* (2002) 534 U.S. 246, 256; see also *Carter v. Kentucky* (1981) 450 U.S. 288, 302-303), and a defendant has the right to instructions that allow the jury to consider his defense (*Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 904-905; see also *Mathews v. United States* (1988) 485 U.S. 58, 63). At the penalty phase of a capital trial, that defense is the defendant's case for life.

A trial court "may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative." (*People v. Gurule*, *supra*, 28 Cal.4th at p. 659; see also *People v. Sanders* (1995) 11 Cal.4th 475, 559-561.) However, the trial court should correct or tailor requested instructions, particularly when a defendant's life is at stake. (See *People v. Whitehorn* (1963) 60 Cal.2d 256, 264-265; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Hall* (1980) 28 Cal.3d 143, 159.)

The instructions requested by appellant were necessary to guide the jury adequately in making the constitutionally-required, individualized moral assessment of the appropriate penalty to impose, and to alleviate confusion engendered by the pattern CALJIC instructions given to the jury. As none of the requested instructions was an incorrect statement of law, argumentative, or

duplicative, the trial court erred by refusing to give those instructions.

1. The Court Erred in Refusing Appellant's Requested Instructions Regarding Mitigating Evidence and Factors

Appellant requested, and the trial court refused, several instructions regarding the jurors' consideration of mitigating evidence. *First*, appellant requested the court to instruct the jury that certain of the sentencing factors could only be considered as mitigating:

> The existence of any of the following circumstances is mitigating and mitigating only:
>
> 1. That the defendant acted under extreme mental or emotional disturbance;
>
> 2. That at the time of the offense, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired as a result of mental disease or the results of intoxication;
>
> 3. That there were other circumstances that extenuate the gravity of the offense.

(3 CT 1000 [Defense Proposed Instruction B].) [69] The court refused to give the instruction, concluding that it was duplicative of CALJIC No. 8.85 and unnecessary under *People v. Livaditis* (1992) 2 Cal.4th 759, and *People v. Hardy* (1992) 2 Cal.4th 86. (16 RT 2999.)

The court's was clearly wrong that the requested instruction was duplicative of CALJIC No. 8.85. Unlike the pattern instruction (3 CT 1049-

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69. The requested instruction concluded: "If you find that any of these circumstances is absent, their absence is not and cannot be aggravating. The absence of mitigation does not amount to the presence of aggravation." (3 CT 1000.) The jury was separately instructed, however, as follows: "Although a number of possible mitigating factors have been listed in these instructions, you cannot consider the absence of any such factors in this case as an aggravating factor. Aggravating factors are limited to those that have been listed for you in these instructions." (3 CT 1051; 16 RT 3092.)

1050), the first two paragraphs of appellant's requested instructions did not contain the term "extreme."

The requested instruction was correct as a matter of law: the factors set forth in the requested instruction can only be mitigating. (See *People v. Wader* (1993) 5 Cal.4th 610, 657; *People v. Whitt* (1990) 51 Cal.3d 620, 654; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport*, *supra*, 41 Cal.3d at pp. 288-289.) Moreover, the court's reliance on *Livaditis* and *Hardy* was misplaced: *Hardy* involved whether a trial court has a sua sponte duty to give such an instruction (*People v. Hardy*, *supra*, 2 Cal.4th at p. 207); *Livaditis* involved whether a trial court is "required to label the sentencing factors as either mitigating or aggravating" (*People v. Livaditis*, *supra*, 2 Cal.4th at p. 784).

By failing to delete the phrase "whether or not" from the standard CALJIC No. 8.85 (3 CT 1049-1050), as appellant's proposed instruction requested (3 CT 1000), the trial court left appellant's jury free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on nonexistent aggravating factors, or based on circumstances that should have been considered as mitigation; and appellant was thereby denied his right to the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885.)

This Court has previously denied such a claim. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) Appellant respectfully requests this Court to reconsider its holding that a trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators. The requested instruction was required because nothing in the instructions given advised the sentencing jurors which of the sentencing factors in CALJIC No. 8.85 were

aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See 3 CT 1049-1050 [CALJIC No. 8.85], 1068-1069 [CALJIC No. 8.88]; 16 RT 3090-3091, 3100-3101 [oral instructions].)

Second, appellant requested the court to instruct the jury that:

> You have previously been given a number of mitigating factors that you may consider in determining the penalty that you consider to be appropriate.
>
> Your consideration of mitigating factors is not limited to those that have been given you. [¶] You may also consider any other facts relating to the circumstances of the case or to the character and background of the defendant as a reason for not imposing the sentence of death.

(3 CT 1003 [Defense Proposed Instruction E].) The court refused to give the instruction, concluding that it was covered under CALJIC No. 8.85, factors (a) and (k). (16 RT 3000.) Appellant also requested the court to instruct the jury that:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors.
>
> You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.

(3 CT 1004 [Defense Proposed Instruction F].) The court refused to give the instruction, concluding that it was cumulative. (16 RT 3000.)

These instructions were clearly correct statements of law. "'[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be

precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.); see also *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674; *People v. Frye* (1998) 18 Cal.4th 894, 1015-1017.) The definition of mitigating evidence is extremely broad. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284-285.) Evidence that responds to, rebuts, weakens, or mitigates the impact of the prosecution's evidence and argument is relevant and admissible at the penalty phase of a capital trial. (See *In re Steele* (2004) 32 Cal.4th 682, 698; *People v. Frye, supra*, 18 Cal.4th at p. 1017.)

Further, the instructions were of particular importance in this case because the prosecutor, at closing argument, told the jurors that there were three factors in aggravation and only one factor in mitigation. (See 16 RT 3109-3114.) The requested instructions would have made it clear to the sentencing jurors that their consideration of mitigation was not limited to the specific factors in CALJIC No. 8.85, and that they could consider any relevant circumstance as a reason for not imposing the death penalty.

This Court has concluded that an instruction similar to Defense Proposed Instruction E is unnecessary because "the catchall section 190.3, factor (k) instruction 'allows the jury to consider a virtually unlimited range of mitigating circumstances.'" (*People v. Smithey* (1999) 20 Cal.4th 936, 1006, quoting *People v. McPeters* (1992) 2 Cal.4th 1148, 1192; [70] see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 673-674.) This Court has also held that a trial court does not err in declining to give an instruction such as Defense

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70. *McPeters* was superseded by statute on other grounds. (See *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.)

Proposed Instruction F, reasoning that the standard jury instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 799, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177.) [71] Appellant respectfully requests this Court to reconsider those conclusions.

Third, appellant requested the court to instruct the jury that:

> You may consider as a mitigating circumstance whether the offense was committed while the defendant was under the influence of any mental or emotional disturbance.

(3 CT 1007 [Defense Proposed Instruction I].) The court refused to give the instruction, concluding that it was covered by factors (d) and (h). (16 RT 3000.) Appellant also requested the court to instruct the jury that:

> You may consider as a mitigating circumstance whether at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct was impaired as a result of mental defect, mental disease, or the effects of intoxication.

(3 CT 1008 [Defense Proposed Instruction J].) The court refused to give this instruction, concluding that it was cumulative to factor (h). (16 RT 3000.)

The court's conclusions were clearly wrong. Unlike CALJIC No. 8.85, as given in this case (3 CT 1049-1050), appellant's requested instructions did not contain the term "extreme." That term imposed a higher standard on the type and quality of mitigating evidence that appellant offered and had the right

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71. This Court has also concluded that an instruction such as Defense Proposed Instruction F is misleading "because it wrongly implied that at least one mitigating factor was needed to justify a sentence of life imprisonment without parole." (*People v. Cook* (2007) 40 Cal.4th 1334, 1364.) In this case, however, appellant requested a separate instruction that would have informed the jury that it could impose a life sentence even in the absence of mitigating factors. (3 CT 1001 [Defense Proposed Instruction C].)

to have fully considered. (See *Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1165-1166.) Jurors must be allowed to consider a defendant's entire personal history and characteristics, not just those that may be seen as "extreme." (See *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. 233, 127 S.Ct. at p. 1674; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1015-1017.)

The error was important here because appellant introduced evidence of mental and emotional disease and disturbance. The prosecutor recognized as much, and devoted 13 pages of argument to that evidence, and to factors (d) and (h), during which he referred to the term "extreme" 10 times. (16 RT 3128-3141.) The instructional error, in combination with the prosecutor's argument, posed a reasonable likelihood that the jury applied the instructions "in a way that prevent[ed] the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.)

This Court has repeatedly concluded that use of the restrictive adjective "extreme" in instructions to the jury "does not act unconstitutionally as a barrier to the consideration of mitigation" (*People v. Harris* (2005) 37 Cal.4th 310, 366; see also *People v. Avila* (2006) 38 Cal.4th 491, 614); and that factor (k) allows the jurors to consider as mitigation a defendant's less-than-extreme mental or emotional disturbance (*People v. Babbitt* (1988) 45 Cal.3d 660, 721). Appellant respectfully urges reconsideration of those conclusions in light of the circumstances present here, including all penalty-phase instructions given, as well as argument by the prosecutor.

Fourth, appellant requested the court to instruct the jury that:

> Evidence has been presented of defendant's lifestyle or background. You cannot consider this evidence as an aggravating factor, but may consider it only as a mitigating factor.

(3 CT 1010 [Defense Proposed Instruction L].) The prosecutor argued that the instruction was "rather confusing" and was "covered under the 8.85

factors." Appellant argued that:

> I think that the fact that the prior criminal -- not -- the prior gang history, the history of my growing up in East Los Angeles, the history of my being a Cholo Chicano as a teenager, I think almost everything that we brought out yesterday, the district attorney may want to have the jury interpret that as an aggravating factor, but I think that because of my socioeconomic background, it should be considered as a mitigating factor, and the jury should be instructed --

(16 RT 3002.) The court interrupted and refused the instruction as duplicative of CALJIC No. 8.85, factor (k). (16 RT 3002.)

The requested instruction was a correct statement of law: "Evidence of a defendant's character and background is admissible under factor (k) only to extenuate the gravity of the crime; it cannot be used as a factor in aggravation." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1033; see also *Zant v. Stephens*, *supra*, 462 U.S. at p. 885; *People v. Hardy*, *supra*, 2 Cal.4th at pp. 207-208; *People v. Cox* (1991) 53 Cal.3d 618, 673.)

In *Hardy*, defendant Reilly complained that the trial court should have instructed the jury that evidence of his background could be considered as mitigating evidence only, and that the court's failure to do so prejudiced him "because there was much evidence presented at the guilt phase that he was frequently unemployed, often abused alcohol and illegal drugs, and in general led a dissolute and aimless life." (*People v. Hardy*, *supra*, 2 Cal.4th at p. 207.) This Court found any error harmless because the prosecution did not urge the jury to find that the case was aggravated by the background evidence. (*Id.* at pp. 207-208; see also *People v. Martinez* (2003) 31 Cal.4th 673, 701.) In *People v. Ochoa* (2001) 26 Cal.4th 398, this Court concluded that the trial court did not err in refusing an identical instruction because the jury was properly instructed on aggravating and mitigating factors. (*Id.* at p. 457, disapproved on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

In this case, the mitigating factors in appellant's life history contained

elements that were likely to have been misconstrued as aggravating by the capital-sentencing jurors: for example, his childhood behavioral problems, history of violent thoughts, problems in school, early institutionalizations. (E.g., 11 RT 2102-2107, 2109, 2117, 2122, 2174, 2207-2211; 15 RT 2921-2124, 2918-2919, 3052; 16 RT 3053-3054.)

Although the prosecutor, in his closing argument, informed the jurors that his attacks on appellant's mitigating evidence were not to be considered as aggravation (16 RT 3127), the real thrust of his argument was made clear as he finished his argument:

> Mr. Frederickson said that he's had a rough life, and perhaps he has. I don't know where you cut off where he creates the rough life and where maybe he's been levied the rough life.
>
> Let's assume he has. Let's assume that under this (k) factor things weren't all that great in his childhood. I can only illustrate it this way, that there are literally thousands, hundreds of thousands of people who have a very hard life, who are born crippled, disfigured at birth. They don't -- they don't have to turn out the way Mr. Frederickson on his record has turned out.
>
> How about the millions of people in Europe who suffered under the Nazi situation, who saw parents, relatives, children killed? You think all those people that suffered under that turned out murderers, turned out to be criminals because of the hardships that they found? No, because they made the decision, the conscious decision to move on with their lives, that they wanted to make something of their life, that they wanted -- you know, notwithstanding the tragedies, the hard luck, all the wrong things that may have occurred around their life, they said, "I choose to make an act of my will to make it in this life and to try and be productive." The defendant has not.

(16 RT 3146.) In light of the evidence and argument in this case, the trial court erred in failing to give appellant's requested instruction.

Fifth, appellant also requested the court to instruct the jury that: "The defendant has no burden in proving the existence of a mitigating factor. You may consider as a mitigating factor any evidence relating to it, no matter how

strong or weak." (3 CT 1011 [Defense Proposed Instruction M].) Similarly, in Defense Proposed Instruction F, he requested the court to instruct the jury that: "A mitigating circumstance does not have to be proved beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it." (3 CT 1004 [Defense Proposed Instruction F].) The court concluded that such an instruction was redundant in light of CALJIC No. 8.85. (16 RT 3003.) Appellant also requested the court to instruct the jury that:

> There is no requirement that all jurors unanimously agree on any matter offered in mitigation. Each juror must make an individual evaluation of each fact or circumstance offered in mitigation. Each juror must make his own individual assessment of the weight to be given such evidence. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(3 CT 1012 [Defense Proposed Instruction N].) The court refused to give these three instructions, concluding that they were covered by CALJIC No. 8.88. (16 RT 3003.)

Each of these instructions was a correct statement of law. "It is settled that a requirement of unanimity improperly limits consideration of mitigating evidence." (*People v. Breaux* (1991) 1 Cal.4th 281, 314; see also *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-444; *Mills v. Maryland*, *supra*, 486 U.S. at pp. 374-378, 384.)

This Court has concluded that a trial court "[is] not required to instruct that unanimity is not required before a juror may consider evidence to be mitigating." (*People v. Breaux*, *supra*, 1 Cal.4th at pp. 314-315; see also *People v. Cook*, *supra*, 40 Cal.4th at p. 1365; *People v. Weaver* (2001) 26 Cal.4th 876, 988.) Appellant respectfully requests this Court to reconsider those decisions. Constitutional error occurs when there is a reasonable likelihood that a jury has applied an instruction in a way that prevents the consideration of

constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That likelihood is present here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation. Moreover, a similar problem is presented by the failure to instruct regarding jury unanimity: appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. (3 CT 779-781.) The failure to give an explicit instruction to the contrary posed a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

2. The Court Erred in Refusing Appellant's Requested Instructions Regarding the Jurors' Consideration of Aggravating Factors

Appellant requested, and the trial court refused, several instructions regarding the jurors' consideration of aggravating factors. *First*, appellant requested the court to instruct the jury that:

> Evidence has been presented by the prosecution as rebuttal to evidence presented by the defense in mitigation. You cannot consider such rebuttal evidence as an aggravating factor unless the evidence is specifically within one or more of the factors in aggravation that have been given to you in these instructions. You may consider such evidence only as it relates to the existence or weight of a mitigating factor.

(3 CT 1015 [Defense Proposed Instruction Q].) When the trial court inquired of the prosecution whether it intended to present any rebuttal evidence, the prosecutor responded: "That depends on what Mr. Frederickson says or doesn't say in his testimony." The court decided to "hold that one out." (16 RT 3003-3004.) Later, the court refused to give the instruction: "Rebuttal evidence, there was none. I will not give defense special Q." (16 RT 3073-3074.)

The requested instruction was a correct statement of law. (See *People v. Johnson* (1993) 6 Cal.4th 1, 53; *People v. Rodriguez* (1986) 42 Cal.3d 730, 790-792

& fn. 24; *People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) [72] Further, the instruction was required in this case. At the penalty phase, the prosecution did not introduce "rebuttal evidence" in the temporal sense; that is, after the defense's case-in-chief. But it did present such evidence in its own case-in-chief: the prosecution presented testimony concerning appellant's putative negative character, lack of remorse, failure to accept responsibility, lack of adjustment in prison, and lack of conscience; and it presented testimony concerning appellant's putative lack of mental illness. (E.g., 14 RT 2573-2575 [Fisher testimony], 2639-2646 [Kralick testimony], 2594-2625 [Dr. Howell testimony], 2672-2673 [Dr. Flores testimony]; 15 RT 2732-2737 [Dr. MacGregor testimony], 2741-2764, 2766-2808 [Dr. Mayberg testimony].) Under this Court's holding in *People v. Boyd* (1985) 38 Cal.3d 762, 772-776, the prosecution's introduction of that evidence was improper because evidence of the defendant's character and background must not be introduced by the prosecution as part of its case-in-chief at the penalty phase. [73] The trial court erred in failing to give the requested instruction.

Second, appellant requested the court to instruct the jury that:

> Before you may consider any of the factors that I have listed for you as aggravating, you must find that the factor has been established by the evidence presented in this case beyond a reasonable doubt. You may not consider any factor as a basis for imposing the punishment of death on the defendant unless you are first convinced beyond a reasonable doubt that it is true.

(3 CT 1016 [Defense Proposed Instruction R].) The prosecutor argued that it was "cumulative." The trial court responded, "I don't think it's the law either,"

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72. This Court has held that such an instruction need not be given sua sponte. (See *People v. Raley* (1992) 2 Cal.4th 870, 914; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1073.)

73. Appellant, forced to proceed without counsel (see Args. 1 & 2, *ante*), raised no objection to these improper actions by the prosecution.

and refused to give the instruction. (16 RT 3004.)

California law does not require that a reasonable-doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty-phase determinations are moral and not "susceptible to a burden-of-proof quantification"]; CALJIC Nos. 8.86, 8.87.) In conformity with this precedent, appellant's jury was expressly instructed that the beyond-a-reasonable-doubt standard does not apply "to proof of which of the two penalties you should go for" (16 RT 3088; 3 CT 1044), and was not instructed that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

The trial court erred in failing to give appellant's requested instruction. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 288, now require any fact (other than a prior conviction) that is used to support an increased sentence be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 3 CT 1068-1069; 16 RT 3101.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt.

Appellant is mindful that this Court has held that the imposition of the

death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, *Ring*, and *Cunningham* impose a reasonable-doubt standard on California's capital penalty-phase proceedings. (See *People v. Romero* (2008) 44 Cal.4th 386, 428-429; *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) Appellant urges this Court to reconsider these decisions so that California's death-penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Third, appellant requested the court to instruct the jury

> Evidence has been introduced in this case that may arouse in you as [*sic*] natural sympathy for the victim or the victim's family. [¶] You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case. [¶] You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(3 CT 1019 [Defense Proposed Instruction U].) The prosecutor argued that the instruction was "unnecessary given the other instructions." The trial court concluded: "The case cited by the defense, People versus Edwards, discussed what evidence would be allowed and what argument could be made by the prosecutor. I believe the content is also covered under 8.85. It will be refused." (16 RT 3005.)

The trial court erred in failing to give the requested instruction. The prosecution presented intensely emotional victim-impact testimony from three witnesses. Home Base cashier Maricela Saucedo testified that she felt responsible for the victim's death because she was the person who asked him to get change. (14 RT 2566-2569.) The victim's aunt, Joyce Fyock, testified that, with regard to the victim's mother, "to think that a man would shoot him dead when he was not doing anything wrong was just almost more than she could stand." (14 RT 2710.) Kirk Wilson, the victim's brother, testified

regarding his brother's appearance in the hospital that his head was "swollen up like a pumpkin"; his eyes were bulging; his head was split open and bleeding; there were staples in his temple; and blood was coming from his ears and nose. (14 RT 2713-2715.)

The emotional intensity of the victim-impact testimony here undoubtedly aroused natural sympathy for the victim's family and friends, and was likely to divert the jurors' attention from their duties under the capital sentencing instructions: "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) As the New Jersey Supreme Court held in *State v. Koskovich* (N.J. 2001) 776 A.2d 144:

> We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(*Id.* at p. 177.) For these reasons, the highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that whenever victim-impact evidence is introduced the trial court must instruct the jury on its appropriate use, and admonish the jury against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.) [74]

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74. Although the language of the required cautionary instruction varies in

Footnote continued on next page . . .

In *People v. Zamudio* (2008) 43 Cal.4th 327, where the trial court refused an instruction similar to that requested by appellant, this Court concluded that the substance of the requested instruction was "adequately covered" by CALJIC No. 8.84.1; and that the "requested instruction [was] misleading to the extent it indicates that emotions may play no part in a juror's decision to opt for the death penalty." (*Id.* at p. 368.; see also *People v. Carey* (2007) 41 Cal.4th 109, 134; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 457.) CALJIC No. 8.84.1 was given here (3 CT 1048; 16 RT 3090) and does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings." But the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim-impact evidence is

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each state, depending on the role victim-impact evidence plays in that state's statutory scheme, common features of those instructions include an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors. An appropriate instruction would read as follows:

> Victim-impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

The first four sentences of this instruction come from the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at page 159. The last sentence is based on the decision of the New Jersey Supreme Court in *State v. Koskovich*, *supra*, 776 A.2d at page 177.

likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions and feelings of the victims' relatives or co-workers.

Further, even if appellant's requested instruction were objectionable, an appropriate limiting instruction was necessary for the jury's proper understanding of the case. Accordingly, the trial court should have corrected the requested instruction. (See *People v. Falsetta*, *supra*, 21 Cal.4th a p. 924 [concluding that "the trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"].)

3. The Court Erred in Refusing Appellant's Requested Instructions Regarding the Jurors' Weighing of the Factors and Its Consideration of Mercy and Sympathy

Appellant requested, and the trial court refused, several instructions regarding the jurors' weighing of the factors and its consideration of mercy and sympathy. *First*, appellant requested the trial court to instruct the jury as follows: "You may decide to impose the penalty of life without the possibility of parole even if you find that there are no mitigating factors present." (3 CT 1001 [Defense Proposed Instruction C].) The prosecutor conceded that "[t]his isn't an incorrect statement," but argued that the instruction was not necessary. The trial court concluded: "It's also determined in People versus Livaditis that that instruction need not be given. It will be refused." (16 RT 2999.)

As the prosecutor recognized, the requested instruction was a correct statement of law: "The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan* (1991) 53 Cal.3d 955, 979.)

Further, the trial court's reliance on *People v. Livaditis*, *supra*, 2 Cal.4th 759, was misplaced. In that case, this Court merely concluded that a trial court has no sua sponte duty to inform the jury that "any specific fact alone might warrant a verdict of life." (*Id.* at p. 782.) In this case, however, appellant requested the instruction.

Appellant acknowledges that in *People v. Johnson*, *supra*, 6 Cal.4th 1, this Court concluded that, given the language of CALJIC No. 8.88, "no reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no mitigating circumstances were found to exist." (*Id.* at p. 52, disapproved on other grounds by *People v. Rogers* (2006) 39 Cal.4th 826, 879; see also *People v. Perry* (2006) 38 Cal.4th 302, 319.) The pertinent question, however, is whether a reasonable juror would believe that his or her options were restricted in some fashion when considering the appropriate punishment. In other words, the constitutionally-relevant question is not whether a juror would assume that death had to be imposed even if there were insubstantial aggravating circumstances, but whether a juror would feel free to return a verdict of life imprisonment without parole in the face of substantial aggravating circumstances and no mitigating circumstances. That is what is implicit in appellant's requested instruction, and what a juror has a right to do.

Second, appellant requested the court to instruct the jury that "[t]he presence of a single mitigating factor is sufficient to support your decision to vote against the death penalty." (3 CT 1002 [Defense Proposed Instruction D].) [75] The court concluded: "Same reasoning as to [Defense Proposed

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75. Appellant requested similar language in Defense Proposed Instruction F: "Any mitigating circumstance presented to you may outweigh all the aggravating factors." (3 CT 1004.) The trial court rejected that instruction as well. (16 RT 3000.)

Instruction] C. It's refused." (16 RT 2999-3000.)

This requested instruction was an accurate statement of law. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1099; *People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5.) [76] The jury must be free "to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." (*People v. Brown* (1988) 46 Cal.3d 432, 468, internal quotation marks omitted.) The jury must be given that freedom, because the penalty determination is a "moral assessment of [the] facts as they reflect on whether defendant should be put to death." (*People v. Easley* (1983) 34 Cal.3d 858, 889; see also *People v. Haskett* (1982) 30 Cal.3d 841, 863.) Since that assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the circumstances." (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1035.)

In *People v. Sanders*, *supra*, 11 Cal.4th 475, this Court noted with approval an instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that a single factor could outweigh all other factors." (*Id.* at p. 557, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 845.) Such an instruction helps eliminate the possibility that the jury will "misapprehend[ ] the nature of the penalty determination process or the scope

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76. In *People v. Lenart* (2004) 32 Cal.4th 1107, this Court concluded that a similar instruction was "argumentative because it state[d] that any mitigating evidence may support a sentence of life without possibility of parole, but it [did] not state that any aggravating evidence may support a death sentence." (*Id.* at p. 1135, citing *People v. Hines* (1997) 15 Cal.4th 997, 1069.) However, even if appellant's requested instruction were objectionable, the trial court erred in failing to correct the instruction. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 924.)

of their discretion to determine [the appropriate penalty] through the weighing process . . . ." (*Sanders, supra*, at p. 557; see also *People v. Anderson*, *supra*, 25 Cal.4th at pp. 599-600 [approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death].)

Appellant acknowledges that this Court has concluded that a trial court does not err in refusing such an instruction: "Nor [is] there any need to specially instruct the jury on the appropriate process of weighing mitigating factors" because CALJIC No. 8.88 "properly describes the weighing process[.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1161; see also *People v. Bolin* (1998) 18 Cal.4th 297, 343.) For the reasons stated above, appellant respectfully requests this Court to reconsider its prior decisions and hold that the instruction requested by appellant must be given in a capital case.

Third, appellant requested the court to instruct the jury as follows:

> The law of California does not require that you ever vote to impose the penalty of death. After considering all of the evidence in the case and instructions given to you by the court, it is entirely up to you to determine whether you are convinced that the death penalty is the appropriate punishment under all of the circumstances of the case.

(3 CT 1017 [Defense Proposed Instruction S].) The prosecutor argued that the instruction was "cumulative." The trial court refused the instruction, concluding that it was covered under CALJIC No. 8.88. (16 RT 3004.)

This requested instruction contained two important points of law which were not clearly covered by CALJIC No. 8.88 or any of the other penalty-phase instructions given in this case: first, that "California law 'expresses no preference as to the appropriate punishment'" (*People v. Earp* (1999) 20 Cal.4th 826, 903; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 852-853), and second, that the decision as to the appropriate punishment is the sole responsibility of the jury (see *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *People v. Milner* (1988) 45 Cal.3d 227, 253-254).

This Court has held that an instruction such as that requested by appellant is "misleading and argumentative" if it does not also inform the jury that the law "has no preference for the punishment of life without possibility of parole[.]" (*People v. Earp*, *supra*, 20 Cal.4th at p. 903.) However, even if appellant's requested instruction were objectionable, the trial court erred in failing to correct the instruction. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 924.)

Because the trial court refused to give this portion of appellant's requested instruction, the jury was unaware of the important facts that California's death-penalty law does not prefer one penalty over another and that the final determination of the appropriate penalty remains the responsibility of each individual juror. (See *People v. Samayoa*, *supra*, 15 Cal.4th at pp. 852-853.)

Fourth, appellant requested the court to instruct the jury on mercy and sympathy as follows:

> After considering all the aggravating and mitigating factors that are applicable in this case, you may decide to impose life in prison without the possibility of parole in exercising mercy on behalf of the defendant. [¶] You may decide not to impose the penalty of death by granting the defendant mercy, regardless of whether or not you determine he deserves your sympathy.

(3 CT 1005 [Defense Proposed Instruction G].)

> Although you were instructed during the guilt phase of this trial that you must set aside any sympathy or pity for a defendant in determining his guilt or innocence, this rule does not apply to the penalty phase of the trial. You may consider sympathy or pity for a defendant, if you feel it appropriate to do so, in determining to impose the penalty of life in prison without the possibility of parole.
>
> If any of the evidence arouses sympathy, or compassion in you to such an extent as to persuade you that death is not the appropriate punishment, you may act in response to these feelings of sympathy and compassion and impose life in prison

without the possibility of parole.

(3 CT 1006 [Defense Proposed Instruction H]; see also 3 CT 1004 [Defense Proposed Instruction F] ["You are permitted to use mercy, sympathy, or sentiment in deciding what weight to give each mitigating factor"].)

The prosecutor argued that the instructions were covered by factor (k). (16 RT 3000.) The trial court refused to give Defense Proposed Instruction F as cumulative, Defense Proposed Instruction G because it "specifically has been disproved [*sic*]" under *People v. McPeters*, *supra*, 2 Cal.4th 1148; and refused to give Defense Proposed Instruction H because it was covered by factor (k). (16 RT 3000.)

This Court has repeatedly rejected the claim that sentencing jurors must be instructed on mercy and sympathy. (See e.g., *People v. Griffin*, *supra*, 33 Cal.4th at pp. 590-591; *People v. Lewis*, *supra*, 26 Cal.4th at p. 393; *People v. Benson* (1990) 52 Cal.3d 754, 808-809.) For the following reasons, appellant respectfully requests that this Court reconsider its prior decisions.

Capital case jurors must be provided with a vehicle for evaluating all mitigating evidence so they may express their "reasoned moral response" in the sentencing decision. (*Penry v. Johnson* (2001) 532 U.S. 782, 797.) Guidance is necessary for the jury to consider and dispense mercy. If jurors are not told that they have the power to consider and dispense mercy, they may falsely believe that the sentencing process involves merely a calculated weighing of factors, leaving them an inadequate means of effecting a moral response to evidence falling outside the enumerated factors. Moreover, the unfettered mitigation inquiry has been defended on grounds that it preserves the defendant's right, and the jury's prerogative, to mercy. By freeing mitigation evidence from any strict requirement of legal relevance, the *Lockett* principle reinforces the entitlement of the sentencer to exercise "discretion to grant mercy in a particular case." (See *Callins v. Collins* (1993) 510 U.S. 1141, 1144

(dis. opn. of Blackmun, J.); *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305 (plur. opn.) [the jury must always be given the option of extending mercy].)

In this case, "mercy" and "compassion" are conspicuous by their absence in the trial court's instructions. The instructions given to the jurors in this case stated:

> (k), any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(3 CT 1049-1050)

> You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

(3 CT 1068-1069) In these circumstances, there is a reasonable likelihood that the jurors would interpret the absence of the terms "mercy" and "compassion" as an indication that they could not consider mercy or compassion. (See *Boyde v. California*, *supra*, 494 U.S. at p. 380.)

The instructional errors were aggravated by the prosecutor's argument in this case. He argued that "mercy" was just another item in the catchall factor (k):

> And finally the (k) factor. This is the everything else category, any other circumstance which extenuates the gravity of the crime, sympathy, mercy, whatever you want to put in here.

(16 RT 3141; see also 16 RT 3113-3114, 3141-3144.)

The absence of the proposed instructions combined with the prosecutor's argument would have reasonably led the jury to believe that the consideration of mercy and sympathy was restricted. Such a misunderstanding during their deliberations would have created a false limitation on their right

and ability to consider and exercise mercy and sympathy. As a result, the prosecutor was able to secure a death sentence, based in part, on the jurors' misunderstanding of the role of mercy and sympathy in deciding the appropriate punishment. Appellant's proposed instructions would have removed any such false restriction on the jury's consideration of mercy and sympathy as a reason to find life over death.

C. The Trial Court's Erroneous Refusal to Give the Requested Instructions Violated Appellant's State and Federal Constitutional Rights

The court's refusal to give the requested instruction violated appellant's rights to a fair trial and a reliable, nonarbitrary, and individualized penalty determination under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. "'[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110, quoting *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) The definition of mitigating evidence is extremely broad. (*Tennard v. Dretke*, *supra*, 542 U.S. at pp. 284-285.) Any barrier to the sentencer's consideration of relevant mitigation, whether by statute, an evidentiary ruling, or instruction by the court, violates the Eighth and Fourteenth Amendments to the United States Constitution. (*Mills v. Maryland*, *supra*, 486 U.S. at pp. 374-376; *Hitchcock v. Dugger*, *supra*, 481 U.S. at pp. 395-399; *Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-7; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 692-693.) The requested instructions were necessary to guide the jury adequately in making the constitutionally-required, individualized moral assessment of the appropriate penalty to impose, and to alleviate confusion engendered by the pattern CALJIC instructions given to the jury. The instructional errors here resulted

in a jury that deliberated without a full understanding of its responsibility for their individualized penalty determination. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. I, §§ 7, 15 & 17.)

California Penal Code section 190.3 also commands a jury to consider all relevant mitigating evidence. Section 190.3, subdivision (k), requires consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In compliance with *Lockett* and its progeny, this Court has interpreted this statutory provision to allow a jury to consider, as a mitigating factor, any aspect of the defendant's character, or record, and any of the circumstances of the offense that a defendant proffers, as a basis for a sentence less than death. (*People v. Easley*, *supra*, 34 Cal.3d at p. 878.) The requested instructions would have "'provided a helpful framework within which the jury could consider the specific circumstances in . . . mitigation set forth in section 190.3.'" (*People v. Adcox* (1988) 47 Cal.3d 207, 269-270, quoting *People v. Dyer* (1988) 45 Cal.3d 26, 77-78.)

Further, the instructional errors did nothing to enhance the reliability of the procedures leading to death. To the contrary, allowing the decision of life or death to turn on a misunderstood concept is inconsistent with the degree of reliability required by the Eighth Amendment:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

(*Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384.) The instructional errors here resulted in a substantial and unacceptable risk that the death sentence was imposed in spite of factors calling for the lesser sentence, in violation of the Eighth and Fourteenth Amendments, and the parallel provisions of the

California Constitution. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. 233, 127 S.Ct. at pp. 1674-1675; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.)

Moreover, the instructional errors violated appellant's right to present a defense under the state and federal constitutions. A hallmark of due process is the right of an accused to present his own defense at guilt. (U.S. Const., 5th, 6th, 8th & 14th Amends; Cal. Const., art. I, §§ 7, 15, 28, subd. (b); *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-327; *People v. Lucas* (1995) 12 Cal.4th 415, 456). Capital sentencing proceedings, too, must "satisfy the dictates of the Due Process Clause." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746.) Accordingly, most of the rights encompassed within the right to present a defense apply at the penalty phase of a capital trial. (See *People v. Blair* (2005) 36 Cal.4th 686, 737-738 ["Sixth Amendment rights, including the right to the assistance of counsel, apply at the penalty stage"]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 160-169; *id.* at p. 174 (conc. opn. of Ginsburg, J.); *Green v. Georgia* (1979) 442 U.S. 95, 95-97; see generally Douglass, *Confronting Death Sixth Amendment Rights at Capital Sentencing* (2005) 105 Colum. L.Rev. 1967.) These rights are guaranteed by the parallel provisions of the California Constitution (Cal. Const., art. I, §§ 7, 15 & 16; *In re Martin* (1987) 44 Cal.3d 1, 30 [the state constitutional right to present a meaningful and complete defense must be deemed to be at least as broad and fundamental as the federal].) The instructional errors here deprived appellant of his right to present a defense because, without the requested instructions, there is a reasonable likelihood that the jury failed to give appropriate weight to the mitigating evidence, gave too much weight to aggravating evidence, and failed to understand how it was to weigh those factors in arriving at its life or death decision.

The refusal of the trial court to give appellant's requested instructions

also violated the Due Process Clause of the Fourteenth Amendment because the omission of the instructions rendered the penalty proceedings fundamentally unfair (U.S. Const., 14th Amend.; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72), and arbitrarily deprived appellant of his state-created liberty interest in having correct, nonargumentative instructions given to the jury (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). "A defendant has a legitimate interest in the character of the procedure which leads to the imposition of the sentence." (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970, citing *Gardner v. Florida* (1977) 430 U.S. 349, 358.) He also had a life interest, under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), in having the jury adequately and accurately instructed as to the meaning and scope of mitigating and aggravating evidence, its consideration and weighing of that evidence, and its ability to consider mercy and sympathy in reaching its life-or-death decision. Further, the denial to appellant of a state-created right granted to other capital defendants violated the Equal Protection Clause of the Fourteenth Amendment. (See *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 425.)

In sum, the trial court's refusal to give the above instructions to the capital sentencing jurors, both individually and cumulatively, violated appellant's right to a decision by a properly-instructed jury, his right to due process and equal protection, his right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

D. The Errors Require Reversal of the Death Judgment

Reversal of the death judgment is required under any reasonable standard of review. First, "when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence-because it is forbidden from doing so by statute or a judicial interpretation of a

statute-the sentencing process is *fatally flawed.*" (*Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. 233, 127 S.Ct. at pp. 1674-1675, emphasis added.)

For the following reasons, reversal is also required under the standard of review for federal constitutional errors set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, under which reversal is required unless the state proves beyond a reasonable doubt that the error did not contribute to the death verdict (see *People v. Smith* (2005) 35 Cal.4th 334, 367); and under the standard of review for state-law errors at the penalty phase, under which a trial court's erroneous refusal of a defendant's proper instruction requires reversal of the death judgment if there is a reasonable possibility that the failure to give the instruction affected the jury's verdict (see *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448).

Clear, accurate, easily understood jury instructions are "vitally important in assuring that jurors grasp subtle or highly nuanced legal concepts." (*United States v. DeStefano* (1st Cir. 1995) 59 F.3d 1, 4.) Nowhere is this more important than at the penalty phase of a capital trial:

> Though instructions are essential for the jury's fact-finding and law-applying functions in every criminal case, the uniqueness of the sentencing jury's task makes it even more important that the jury be instructed at the penalty phase "with entire accuracy."

(Poulos, *The Lucas Court and the Penalty Phase of the Capital Trial: The Original Understanding* (1990) 27 San Diego L.Rev. 521, 627, footnote omitted, quoting *People v. Ah Fung* (1861) 17 Cal. 377, 379.)

Further, when the jury is the sentencing authority, the Eighth Amendment's twin goals of preventing the death penalty from being administered in an arbitrary and unpredictable manner and mandating that the sentencing authority be allowed to consider any relevant mitigating evidence (see *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 110-111) can only be accomplished by accurate, unambiguous instructions. The instructions must

inform the sentencing jury of the factors it must take into account in the sentencing decision, and the process it must employ in exacting this awesome penalty. Appellant's requested instructions would have clarified the standard CALJIC instructions, and provided needed guidance to the jury regarding its consideration of mitigating and aggravating factors, its weighing of those factors, and its ability to consider mercy and sympathy. Accordingly, they were vital to the jury's understanding of its duties in making the life-or-death decision.

The defense's concerns about the jurors' ability to glean the scope of factor (k) have been confirmed in a study of California jurors who had actually served in capital cases. The study found that many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it "fit in" with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. (Haney, et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 (no. 2) J. of Social Issues 149, 167-168; see also Haney and Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law and Hum. Beh. 411, 418-424.)

Appellant's proposed instructions were both necessary and appropriate to guide the jury's consideration of penalty. Because there is a reasonable likelihood that the jury applied the penalty-phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California*, *supra*, 494 U.S. at p. 380), and because the instructions given contained ambiguities "concerning the factors actually considered by [the sentencing body in imposing a judgment of death]" (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 119 (conc. opn. of O'Connor, J.), to uphold the death sentence on the instructions given would "risk that the death penalty [was] imposed in

spite of factors which [called] for a less severe penalty" (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [concluding that "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision"]). [77] "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett*, *supra*, at p. 605.) Accordingly, the judgment of death must be reversed.

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77. *Penry* was overruled on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304, 321.

14. THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO CLEARLY INSTRUCT THE JURORS THAT THEY WERE REQUIRED TO CONSIDER THE APPLICABLE STATUTORY SENTENCING FACTORS IN DETERMINING APPELLANT'S PENALTY

At the conclusion of the penalty phase, the trial court orally instructed the jury with the following version of CALJIC No. 8.85:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may hereafter be instructed. *You may consider*, take into account and be guided by the following factors, if applicable . . . . [78]

(16 RT 3090, emphasis added.)

This instruction, as given by the court, violated both state law and the federal Constitution.

Section 190.3, which sets out the factors the penalty jury is to consider in determining the sentence a defendant will receive, requires that "In determining the penalty, the trier of fact *shall* take into account" the listed factors (a) through (k), if applicable. (§ 190.3, ¶ 4, emphasis added.) The same section states, two paragraphs later, that, "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact *shall* consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section. . . ." (§ 190.3, ¶ 6, emphasis added.) The standard version of CALJIC No. 8.85 tracks this statutory language, informing the jurors as follows: "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You *shall* consider, take into

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78. This paragraph of the instruction was followed by the sentencing factors set forth in CALJIC No. 8.85. (3 CT 1049-1050; 16 RT 3090-3092.)

account and be guided by" the statutory factors, if applicable. (CALJIC No. 8.85, emphasis added.)

Here, the trial court erred by deviating from the standard language of CALJIC No. 8.85 set forth above. Instead of instructing the jurors that they shall consider, take into account and be by guided" the sentencing factors, the court told them they "may consider, take into account and be guided by" those factors. (3 CT 1049-1050; 16 RT 3090-302.) This was a clear violation of the plain language of section 190.3.

The inexplicable change of this single critical word in the standard instruction not only violated the state law requirement of section 190.3, but also undermined a key component of the system of guided discretion upon which the constitutionality of California's death penalty scheme rests. Capital sentencing jurors must be "given guidance regarding the factors about the crimes and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192 (opn. of Stewart, Powell, and Stevens, JJ.).) Their discretion must be "'controlled by clear and objective standards so as to produce non-discriminatory application.'" (*Id.* at p. 198.) The mandatory consideration of the evidence in light of the applicable sentencing factors is a significant part of that guidance under California law. (See *People v. Frierson* (1979) 25 Cal.3d 142, 177 [fact that section 190.3 "lists specific factors which must be considered in deciding whether or not to impose the death penalty" supports the proposition that penalty jury's discretion is guided in a constitutional manner].) In this case, the trial court's instruction explicitly, and incorrectly, informed the jurors that they were merely permitted, not required, to consider the applicable factors in section 190.3. As a result, the jurors could have ignored most or all of appellant's mitigation case by deciding that sympathetic aspects of appellant's character and record did not need to be considered in

deciding appellant's penalty.

The erroneous instruction also violated appellant's state and federal constitutional rights. "'[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma* (1980) 455 U.S. 104, 110, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Any barrier to the sentencer's consideration of relevant mitigation, including an erroneous instruction, violates the federal Constitution. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 395-399; *People v. Mickey* (1991) 54 Cal.3d 612, 692-693.)

At both the sanity and penalty phases, appellant presented evidence regarding, inter alia, his early childhood difficulties, mental illness, brain abnormalities, and sympathetic character. (See, e.g., 11 RT 2102-2109, 2117, 2122, 2174; 15 RT 2889, 2916-2918; 16 RT 3015-3028.) The jury was constitutionally required to consider and give effect to that evidence. The instruction given by the trial court, however, erroneously permitted the jurors to simply disregard any or all of this substantial evidence in mitigation. That error created a reasonable likelihood that the jury applied the instruction "in a way that prevent[ed] the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.)

The instructional error also violated appellant's right under the state and federal constitutions to present a complete defense, including the right to accurate instructions that allow the jury to consider the defense. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Mathews v. United States* (1988) 485 U.S. 58, 63; *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 916; *People v. Lucas* (1995) 12 Cal.4th 415, 456 [right to present a defense under the state Constitution].) The instruction here infringed that right by erroneously informing the jurors

that they were merely permitted, not required, to consider the evidence under the sentencing factors, and by creating a reasonable likelihood that the jurors failed to consider and give appropriate weight to the mitigating evidence in arriving at their life-or-death decision.

Moreover, by not clearly instructing the jurors that they must consider the mitigating evidence under the sentencing factors, the erroneous instruction injected an unconstitutional arbitrariness and capriciousness into the penalty-selection process, and resulted in a substantial and unacceptable risk that the death sentence was imposed in spite of factors calling for the lesser sentence, in violation of the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674-1675; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117 (conc. opn. of O'Connor, J.) [Supreme Court's capital cases require the removal of "any legitimate basis for finding ambiguity concerning the factors actually considered" in the trial court]; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135.)

Finally, the error deprived appellant of his state-created liberty interest in having correct instructions given to the jury. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Appellant had "a legitimate interest in the character of the procedure which [led] to the imposition of the sentence." (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-970, citing *Gardner v. Florida* (1977) 430 U.S. 349, 358.) He also had a life interest, under the Eighth and Fourteenth Amendments (see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288-289 (conc. opn. of O'Connor, J.)), in having the jury adequately and accurately instructed as to its duty to consider the mitigating evidence under the sentencing factors in reaching its life-or-death decision.

It is true that the written version of CALJIC No. 8.85 provided to the

jury here correctly used the word "shall" instead of "may" (3 CT 1049); and that the trial court later instructed the jury in the language of CALJIC No. 8.88 that it "shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" (3 CT 1068-1069; 16 RT 3100). To the extent that these instructions conflict with the erroneous version of CALJIC No. 8.85 given in this case, it is impossible to tell how the jurors resolved the conflict. It cannot be established that the jurors followed one instruction rather than the other. (See *Francis v. Franklin* (1985) 471 U.S. 307, 320-321 & fn. 7.)

The version of CALJIC No. 8.85 given by the court was both erroneous and constitutionally flawed. Because the People cannot establish that this serious instructional error was harmless beyond a reasonable doubt (see *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 446-468 [reasonable-possibility standard]), appellant's death sentence must be reversed.

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15. CALIFORNIA'S DEATH PENALTY SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Section 190.2, Both Facially and As Applied Here, Violates the Federal Constitution

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) In California, the special circumstances listed in section 190.2 "perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances'" used in the

capital sentencing statutes of some other states. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. Given the sheer number of special circumstances (at the time of the offense charged against appellant, section 190.2 contained 21 special circumstances), and the scope of those circumstances, California's death penalty scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. The scheme is overbroad because of the number and scope of special circumstances defining capital murder, and fails to define a subclass of those more deserving of the death penalty than others. Moreover, the scheme is infirm because murders arising from crimes that are commonly committed are likely to qualify as capital crimes under one or more special circumstances; and is overbroad because it permits death for many first degree murders, including unintentional felony-murder. And, this Court has construed the special circumstances in an overly expansive manner. (U.S. Const., 5th, 6th, 8th & 14th Amends.)

In addition, the felony-murder special circumstance (§ 190.2, subd. (17)), both facially and as applied here, [79] violates the federal Constitution because it: fails to provide a meaningful basis for narrowing death eligibility, i.e., fails to narrow the class of "death eligible" defendants to a smaller subclass more deserving of the death penalty than those not so included; fails to meet minimal Eighth Amendment death penalty standards; improperly imposes death eligibility on those who kill unintentionally during the

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79. In this case, the alleged attempted robbery was used to establish first degree murder, the felony-murder special circumstance, and as aggravating evidence at the penalty phase. (E.g., 3 CT 776 [CALJIC No. 8.21; 3 CT 782 [CALJIC No. 8.81.17]; 16 RT 3115-3119 [prosecutor's closing argument].)

commission of a felony; fails to require a finding of premeditation or deliberation or any other morally qualifying intent; makes a much larger class of murderers -- those who kill with premeditation but not in the commission of a qualifying felony -- not subject to the death penalty.

Moreover, both facially and as applied here, the California death penalty scheme violates the federal Constitution, including the Double Jeopardy Clause of the Fifth Amendment, the Sixth Amendment right to a fair jury trial, the Eighth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, because it allows the "triple use" of the same facts (the underlying felony) as a basis for a first degree murder, as the basis for the special circumstance, and as an aggravating factor. (U.S. Const., 5th, 6th, 8th & 14th Amends.)

This Court has repeatedly rejected these challenges to the eligibility process in California's death penalty scheme. (See *People v. Abilez* (2007) 41 Cal.4th 472, 528; *People v. Stanley* (2006) 39 Cal.4th 913, 968; *People v. Cook* (2006) 39 Cal.4th 566, 617; *People v. Boyer* (2006) 38 Cal.4th 412, 483; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Cornwell* (2005) 37 Cal.4th 50, 102; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Frye* (1998) 18 Cal.4th 894, 1028-1030; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265-1266; *People v. Clark* (1993) 5 Cal.4th 950, 1041; *People v. Webster* (1991) 54 Cal.3d 411, 455-456; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946; *People v. Bean* (1988) 46 Cal.3d 919, 950-951; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147.) Appellant respectfully requests this Court to reconsider those decisions and strike down section 190.2, both facially and as applied here.

B. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 3 CT 1049-1050; 16 RT 3091.) Prosecutors throughout California have argued that the jury could

weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. Thus, in this case, the prosecutor argued under factor (a) that the circumstances of the crime were aggravated because it was planned, not spontaneous; that the crime was aggravated because the motive was financial; that the shooting was aggravated because it was "execution style" and "very personal"; that appellant had a "malignant heart" and was a "cold, calculated person"; and that the fact that appellant fled from the store showed he had no remorse. (16 RT 3116-3120.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749-750 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the

meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

As discussed in Argument 14, the California death penalty scheme violates the federal Constitution by failing to require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (See Arg. 13, *ante*; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 288.)

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that this Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence. In fact, however, the jury was expressly instructed that "there is no burden on either side as to which penalty you would vote to impose." (14 RT 2553; see also Arg. 13, *ante*.)

CALJIC Nos. 8.85 and 8.88, the instructions given here (3 CT 1049-1050, 1068-1069), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming that it were permissible not to have any burden of

proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance that the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.); see also Arg. 13, *ante*.)

The failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must

render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause of the federal Constitution and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant respectfully asks this Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. <u>Unadjudicated Criminal Activity</u>

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 3 CT 1054; see Arg. 13, *ante.*) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior

conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.)

In this case, the prosecution presented extensive testimony regarding unadjudicated criminal activity allegedly committed by appellant (14 RT 2561-2565 [Tawasha testimony]; 14 RT 2627-2634 [Henry testimony]; 14 RT 2656-2668 [Martinez testimony]; 14 RT 2648-2655 [Blakely testimony]), introduced a number of exhibits relating to the same (Exhs. 58, 60-62), and devoted a considerable portion of its closing argument to arguing these alleged offenses (16 RT 3120-3123).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He respectfully asks this Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on An Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (3 CT 1068-1069.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to

minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo*, *supra*, 6 Cal.4th at pp. 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Penalty Jury Should Have Been Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v.*

Williams (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right

to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook*, *supra*, 39 Cal.4th at p. 619.) Appellant urges this Court to reconsider its decisions on the necessity of written findings.

E. The Trial Court Erred by Failing to Delete the Inapplicable Sentencing Factors from the Instructions

Several of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, including factors (e), (f), (g), and (j). The trial court failed to omit those factors from the jury instructions (3 CT 1049-1050; 16 RT 3091-3092), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant respectfully asks this Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at page 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the Equal Protection Clause of the Fourteenth Amendment. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks this Court to reconsider those decisions.

H. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty, violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (See, e.g., *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a

regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions in this area.

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16. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

As argued in the Introduction to this brief, the course of this case was fundamentally and irrevocably altered when the municipal court erroneously failed to accept appellant's guilty plea. Had that plea been accepted, appellant would have been represented by counsel, both pretrial and at the penalty phase, counsel would have participated fully at the penalty phase, and appellant would have been able to present a credible case for life based on acceptance of responsibility.

Appellant has argued that those errors were reversible per se. (See Args. 1 & 2.) But even if the errors were not prejudicial per se, or even if this Court concludes that no error occurred, the arguments raised herein regarding

the guilt and special circumstance phase (Args. 3-12) and the arguments relating to the penalty phase (Args. 13-15) must be assessed in light of the fact that appellant sought to plead guilty, was not allowed to do so, and was without counsel as he faced "the prosecutorial forces of organized society[.]" (*Rothgery v. Gillespie County, Tex.* (2008) __ U.S. __, 128 S.Ct. 2578, 2583, internal quotation marks omitted; see also *Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Powell v. Alabama* (1932) 287 U.S. 45, 69.)

With regard to the guilt and special circumstance phase, the cumulative effect of the errors raised herein (Args. 1-12) so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

With regard to the death judgment, it must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) This Court has expressly, and correctly, recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the

penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Here, the cumulative effect of the guilt/special circumstance errors (Args. 1-12) and the penalty phase errors (Args. 13-15), even if individually not found to be prejudicial, precluded the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's conviction and death sentence.

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CONCLUSION

For all of the reasons stated above and in appellant's opening brief, the convictions and death sentence in this case must be reversed.

DATED: January 9, 2009.

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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630(b)(2), I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the tables, contains approximately 89,000 words.

DATED: January 9, 2009.

DOUGLAS WARD
Deputy State Public Defender

Attorney for Appellant
DANIEL FREDERICKSON

DECLARATION OF SERVICE

Re: *People v. Frederickson*, No. S054372

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

The Honorable Jerry Brown
Attorney General of the State of California
110 W. "A" Street, Suite 1100
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Clerk of Superior Court
Attn: Death Penalty Appeals
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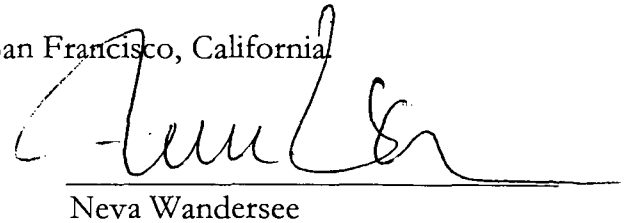
Tamal, California 94974

Each said envelope was then, on January 9, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on January 9, 2009, at San Francisco, California



Neva Wandersee